



COUNCIL CONSEIL
OF EUROPE DE L'EUROPE

TWENTY GUIDELINES ON FORCED RETURN

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PRELIMINARY NOTE

On 4 May 2005, at the 925th Meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe on one hand adopted twenty Guidelines on forced return and, on the other hand, took note of the comments on these guidelines drafted by the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR).

Although only the Guidelines have been formally adopted by the Committee of Ministers, in this publication both texts have been put into one single document in order to make the Guidelines more readable and easier to understand. To prevent any confusion, only the text formally adopted by the Committee of Ministers has been highlighted in grey.

**TWENTY GUIDELINES
OF THE COMMITTEE OF MINISTERS OF EUROPE
ON FORCED RETURN ¹**

The Committee of Ministers,

Recalling that, in accordance with Article 1 of the European Convention on Human Rights, member states shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention;

Recalling that everyone shall have the right to freedom of movement in accordance with Article 2 of Protocol No. 4 to the Convention;

Recalling that member states have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens on their territory;

Considering that, in exercising this right, member states may find it necessary to forcibly return illegal residents within their territory;

Concerned about the risk of violations of fundamental rights and freedoms which may arise in the context of forced return;

Believing that guidelines not only bringing together the Council of Europe's standards and guiding principles applicable in this context, but also identifying best possible practices, could serve as a practical tool for use by both governments in the drafting of national laws and regulations on the subject and all those directly or indirectly involved in forced return operations;

Recalling that every person seeking international protection has the right for his or her application to be treated in a fair procedure in line with international law, which includes access to an effective remedy before a decision on the removal order is issued or is executed,

1. Adopts the attached guidelines and invites member states to ensure that they are widely disseminated amongst the national authorities responsible for the return of aliens.

2. Considers that in applying or referring to those guidelines the following elements must receive due consideration:

a. none of the guidelines imply any new obligations for Council of Europe member states. When the guidelines make use of the verb "shall" this indicates only that the obligatory character of the norms corresponds to already existing obligations of member states. In certain cases however, the guidelines go beyond the simple reiteration of existing binding norms. This is indicated by the use of the verb "should" to indicate where the guidelines constitute recommendations addressed to the member states. The guidelines also identify certain good practices, which appear to represent innovative and promising ways to reconcile a return policy with full respect for human rights. States are then "encouraged" to seek inspiration from these practices, which have been considered by the Committee of Ministers to be desirable;

¹ When adopting this decision, the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.

b. nothing in the guidelines shall affect any provisions in national or international law which are more conducive to the protection of human rights. In particular, in so far as these guidelines refer to rights which are contained in the European Convention on Human Rights, their interpretation must comply with the case-law of the European Court of Human Rights;

c. the guidelines are without prejudice to member states' reservations to international instruments

COMMENTARY

Background

1. The origin of these Guidelines lies in Parliamentary Assembly Recommendation 1547(2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity. In its reply to Recommendation 1547(2002), the Committee of Ministers of the Council of Europe expressed its support for the idea put forward by the Parliamentary Assembly to draw up a code of good conduct for expulsion procedures that “would make it possible to lay down the various guidelines developed by different bodies within the Council of Europe in one pragmatic text to be used by governments when developing national legislation and regulations on the subject”. The Committee of Ministers also found that “such a text should also be a useful source of guidance for those directly or indirectly involved in expulsion measures” and “would provide an opportunity to increase the visibility of the Council of Europe’s activities in this field”.

2. In its Decision No. CM/859/09092003, the Committee of Ministers requested the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) to prepare a draft set of non-binding guidelines on expulsion procedures with the assistance of a Working Party composed of six experts appointed by the CAHAR, two experts appointed by the Steering Committee for Human Rights (CDDH) and two experts appointed by the European Committee on Migration (CDMG). The Working Party held four meetings that took place on 11-12 December 2003, on 30-31 March 2004, on 1-2 July 2004 and on 1-3 September 2004. Subsequently the draft Guidelines were discussed at the 55th Meeting of CAHAR (20-22 October 2004) who decided to forward the draft Guidelines to the Committee of Ministers for adoption. It adopted the Guidelines at the 925th Meeting of the Ministers’ Deputies on 4 May 2005.

3. In order to identify existing standards developed within the Council of Europe that have a bearing on expulsion matters, detailed research was carried out, in particular with regard to the case-law of the European Court of Human Rights and the jurisprudence of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter “CPT”).

4. With a view to identifying certain relevant “good practices”, a questionnaire on forced return, prepared by the Working Party, was sent to the members of the CAHAR. Answers to the questionnaire were provided by 27 member states.

5. The Working Party on Expulsion Procedures held a subsequent meeting on 17-19 January 2005 with a view to preparing these comments.

Scope of application

The Guidelines apply to procedures leading to the expulsion of non-nationals from the territory of members states of the Council of Europe. Refusals to enter the national territory at the border are not included in their scope of application, although certain norms restated in the Guidelines are applicable to such decisions.

Reservations:

If in the adoption process of the Guidelines by the Committee of Ministers of the Council of Europe, a member state declares that it reserve the rights of its government, in accordance with the Rules of Procedure for the meetings of the Minister’s Deputies, to comply or not with some Guidelines, the effect of such declaration shall extend to the commentaries that relate to the Guidelines concerned.

Chapter I – Voluntary return

Guideline 1. Promotion of voluntary return

The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.

COMMENTARY

1. Voluntary return is preferable to forced return, and it presents far fewer risks with respect to human rights. Therefore it is recommended to host states to promote voluntary return, in particular by affording the returnee a reasonable time for complying voluntarily with the removal order, by offering practical assistance such as incentives or meeting the transport costs, by providing complete information to the returnee, in a language he/she can understand, about the existing programmes of voluntary return, in particular those of the International Organization for Migration (IOM) and other similar organisations, which the host states have been encouraged to set up and to develop (see Parliamentary Assembly Recommendation 1237(1994) on the situation of asylum-seekers whose asylum applications have been rejected, para. 8, ix, b); and, with respect to the role of the IOM, the reply of the Committee of Ministers adopted on 21 January 2004 at the 869th Meeting of the Ministers' Deputies to Parliamentary Assembly Recommendation 1607(2003) on activities of the IOM (CM/AS(2004)Rec1607 final).

2. It is not the purpose of these Guidelines to detail the variety of programmes which states have adopted to facilitate and promote the voluntary compliance by foreigners with removal orders which they have been served with. It could be recalled however that forced return should be considered to be less desirable than voluntary return. It is also important that persons residing illegally on the territory receive proper information about the programmes which exist, for instance by brochures containing that information in different languages. States could moreover be encouraged to regularly update and amend their voluntary return programmes in the light of experience gained and the experience of other states with similar programmes. The use of indicators could contribute to this objective.

Chapter II – The removal order

Guideline 2. Adoption of the removal order

Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.

1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

2. The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.

3. If the state of return is not the state of origin, the removal order should only be issued if the authorities of the host state are satisfied, as far as can reasonably be expected, that the state to which the person is returned will not expel him or her to a third state where he or she would be exposed to a real risk mentioned in paragraph 1, sub-paragraph a. and b. or other situations mentioned in paragraph 1, sub-paragraph c.

4. In making the above assessment with regard to the situation in the country of return, the authorities of the host state should consult available sources of information, including non-governmental sources of information, and they should consider any information provided by the United Nations High Commissioner for Refugees (UNHCR).

5. Before deciding to issue a removal order in respect of a separated child, assistance – in particular legal assistance – should be granted with due consideration given to the best interest of the child. Before removing such a child from its territory, the authorities of the host state should be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.

6. The removal order should not be enforced if the authorities of the host state have determined that the state of return will refuse to readmit the returnee. If the returnee is not readmitted to the state of return, the host state should take him/her back.

COMMENTARY

1. The first sentence of this Guideline refers to the prohibition on arbitrariness in the adoption of removal orders, as an essential guarantee against the risk of discrimination in the enjoyment of the rights and freedoms of the European Convention on Human Rights.

2. It states that the decision to return an alien must be in pursuance of a decision reached in accordance with law. This language has the same meaning as in Article 1 of Protocol No. 7 ECHR, which states that “An alien lawfully resident in the territory of a state shall not be expelled therefrom except in pursuance of a decision reached in accordance with law ...”. As stated in the explanatory report to this Protocol, the decision therefore “must be taken by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules” (para. 11). The scope of application *ratione personae* of Article 1 of Protocol No. 7 ECHR is narrower than that of these Guidelines, however the Guidelines take the view that this elementary guarantee should be afforded to all persons subject to an expulsion measure, whichever their administrative status (“lawful resident” or not) and whether or not the proposed removal order would contravene an individual’s right under the European Convention on Human Rights.

3. The rest of the Guideline is based on the idea that, as the host state shall not return aliens under its jurisdiction in circumstances as defined in paragraph 1 of this Guideline, the removal order shall only be adopted if the host state is satisfied as far as can reasonably be expected on the basis of information readily available to them, that none of these circumstances are present. Of course, the addressee of the removal order may seek to have the order suspended, and possibly annulled, by exercising his/her right to an effective remedy against the decision to return him/her (see Guideline 5). However the Guideline favours a more preventive approach, with a view to limiting the number of cases where these remedies shall have to be pursued.

Paragraph 1:

1. The requirement formulated in indent a) of the first paragraph of this Guideline follows from the case-law of the European Court of Human Rights according to which “expulsion by a Contracting State may give rise to an issue under Article 3 [ECHR], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country” (Eur. Ct. HR, *Soering v. the United Kingdom* judgment of 7 July 1989, Series A No. 161, p. 35, para. 88, Eur. Ct. HR, *Chahal v. the United Kingdom* judgment of 15 November 1996 (Appl. No. 22414/93), para. 74). The prohibition of expulsion extends to situations where a person risks being condemned to the death penalty in violation of Protocol No. 13 to the Convention.

2. With respect to the risk of being subjected to torture, the prohibition of imposing a person to return is also stipulated in Article 3(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by the UN General Assembly Resolution 39/46 of 10 December 1984. The European Court of Human Rights also has ruled that the implementation of the removal order where the vital medical treatment he/she is following would be interrupted may, under certain exceptional circumstances, amount to an inhuman treatment (Eur. Ct. HR, *D. v. the United Kingdom* judgment of 2 May 1997 (Appl. No. 30240/90); *Bensaïd v the United Kingdom* judgment of 6 February 2001 (Appl. No. 44599/98)).

3. The European Court of Human Rights has not decided that expelling a person to a country where he/she runs the risk of being sentenced to life imprisonment without any possibility of early release constitutes a violation of Article 3 ECHR. However, it found that such a situation may raise an issue under that Article². See also Recommendation Rec(2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners.

² Eur. Ct. HR, *Weeks v. the United Kingdom* judgment of 2 March 1987, Series A No. 114; Eur. Ct. HR, *Nivette v. France* (dec.), No. 44190/98, 14 December 2000; Eur. Ct. HR, *Sawoniuk v. the United Kingdom* (dec.), No. 63716/00, 29 May 2001 (where, citing the case-law of the European Commission on Human Rights (*Weeks v. the United Kingdom*, No. 9787/82, Commission Report 12 December 1993, § 72, and *Kotalla v. the Netherlands*, Appl. No. 7994/77, Commission decision of 6 May 1978, DR 14, p. 238), the Court notes that the Commission has expressed the view that “a life sentence without any possibility of release might raise issues of inhuman treatment”); Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 27.

4. With regard to indent b), it could be recalled that the European Court of Human Rights noted that the protection afforded by Article 3 ECHR extends to situations “where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection” (*H.L.R. v. France*, judgment of 29 April 1997 (Appl. No. 24573/94), para. 40). The formulation chosen takes into account that, under the definition given in public international law, “torture” is a notion reserved to acts by state agents or private agents acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984).

5. The requirement formulated in indent c), reflects, in particular, the principle of “non refoulement” as set out in Article 33(1) of the 1951 Convention relating to the Status of Refugees. States are also reminded of the existence of international instruments relating to subsidiary protection. Indent c) also takes into account the case-law of the the European Court of Human Rights which has considered that “it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by [a decision to return a person] in circumstances where the [returnee] has suffered or risks suffering a flagrant denial of justice in the requesting country (see the *Soering* judgment cited above, p. 45, § 113, and, *mutatis mutandis*, the *Drozdz and Janousek v. France and Spain* judgment of 26 June 1992, Series A No. 240, p. 34, § 110)”³.

Paragraph 2:

1. This paragraph aims at protecting the right to respect for family and/or private life of the returnee as well as his/her right to family life when he/she has developed a family life in the host country. This requirement results from an important case-law of the European Court of Human Rights, based on Article 8 ECHR⁴.

2. It should also be noted that, in a specific case, the European Court of Human Rights has found that Article 8 ECHR was violated where an expulsion took place which made impossible the participation of the expelled person to proceedings for which his/her presence is indispensable (Eur. Ct. HR, *Ciliz v. the Netherlands* judgment of 11 July 2000 (para. 71)).

3. In implementing the requirements of this case-law in their national regulations, the member states of the Council of Europe could seek inspiration from Recommendation Rec(2000)15 of the Committee of Ministers to the Member States of the Council of Europe concerning the security of residence of long-term migrants and, to a certain extent, from Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe concerning the non-expulsion of long-term immigrants.

Paragraph 3:

The 3rd paragraph of this Guideline follows from the inadmissibility decision of 7 March 2000 reached by the European Court of Human Rights in the case of *T.I. v. the United Kingdom* (Appl. No. 43844/98), where the Court considered that “The indirect removal [...] to an intermediate country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”, and which emphasized the obligation of the host state to ensure that “there are effective procedural safeguards of any kind protecting the applicant from being removed” to a third country. It is at the discretion of the host state to decide on the way it verifies the nature of the safeguards operated in the state of return. This would be even more valid where the state to which the returnee is to be returned, and from where he/she fears being expelled to a third state, is not a member state of the Council of Europe bound by the ECHR. It will be noted that the Committee against Torture (CAT) adopts the same interpretation of Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, according to which “No state Party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture” (see, in the recent case-law, decision of 11 November 2003 on communication No. 153/2000, *R.T. v. Australia*, point 6.4.).

³ Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 32.

⁴ Eur. Ct. HR, *Moustaquim v. Belgium* judgment of 18 February 1991; Eur. Ct. HR, *Beldjoudi v. France* of 16 March 1992; Eur. Ct. HR, *Nasri v. France* judgment of 13 July 1995; Eur. Ct. HR, *C. v. Belgium*, 7 August 1996; Eur. Ct. HR, *Ezzoudhi v. France* judgment of 13 February 2001; Eur. Ct. HR (1st Sect.), *Amrollah v. Denmark* judgment of 11 July 2002, Appl. No. 56811/00; Eur. Ct. HR, *Boultif v. Switzerland* judgment of 2 August 2001, Appl. No. 54273/00; Eur. Ct. HR, *Benhebba v. France* judgment of 19 June 2003, Appl. No. 53441/99, para. 32; Eur. Ct. HR, *Mokrani v. France*, judgment of 15 July 2003, Appl. No. 52206/99, para. 30-32.

Paragraph 4:

According to this Guideline, the assessment referred to in Paragraphs 1 to 3 should be made by the national authorities of the host state before issuing a removal order. In its 4th paragraph, the Guideline adds that in making the required verifications, the authorities of the host state should consult reliable available sources of information. In this respect it could be noted that, in the *Jabari v. Turkey* judgment of 11 July 2000 (Appl. No. 40035/98), the Court found that it “must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which would face the applicant if her deportation were to be implemented”.

Paragraph 5:

The first sentence of the paragraph, concerning the removal of separated children, derives from Articles 3(1) and 24 of the Convention on the Rights of Child, adopted and opened for signature by the United Nations General Assembly in its Resolution 44/25 of 20 November 1989. The requirement that the child be provided with legal and other appropriate assistance is formulated in Article 37 (d) of the Convention on the Rights of the Child in all the situations where the child is deprived from his liberty.

Paragraph 6:

The recommendation contained in this paragraph aims at avoiding a situation where foreigners are being put “in orbit”, i.e., they are obliged to leave the country where they are found without an assurance that they will be able to enter another country. In the case of *Harabi v. the Netherlands*, the European Commission on Human Rights recalled that it “held that the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention (...). Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise his situation” (Appl. No. 10798/84, dec. of 5 March 1986, DR 46, p. 112). The host state, the state of origin and the state of return have a joint responsibility to ensure that such situations do not occur. Guideline 2 paragraph 6 and Guidelines 12 (cooperation between states) and 13 (States' obligations) therefore must be seen as complementary and mutually supportive.

Guideline 3. Prohibition of collective expulsion

A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

COMMENTARY

1. This Guideline restates the significance attached by the European Court of Human Rights to Article 4 of Protocol No. 4 to the ECHR. This case-law provides that collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien. (see the inadmissibility decision of 23 February 1999 in the case of *Andric v. Sweden* (Appl. No. 45917/99), unpublished).
2. This rule does not prohibit the material organisation of departures of groups of returnees, but the removal order must be based on the circumstances of the individual who is to be removed, even if the administrative situations of the members of that group are similar or if they present certain common characteristics.
3. It may not be sufficient however to adopt individual removal orders, if the stereotypical character of the reasons given to justify the notification of a removal order or the arrest to ensure compliance with that order, or other factors, indicate that a decision may have been taken in relation to the removal from the territory of a group of aliens, without regard to the individual circumstances of each member of the group (Eur. Ct. HR (3rd Sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 59; and the friendly settlements reached in the cases of *Sulejmanovic and others* and *Sejdovic and Sulejmanovic v. Italy* (Appl. No. 57574/00 and No. 57575/00) (judgment of 8 November 2002 (Eur. Ct. HR (1st Sect.))).

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

- the legal and factual grounds on which it is based;
- the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.

2. Moreover, the authorities of the host state are encouraged to indicate:

- the bodies from whom further information may be obtained concerning the execution of the removal order;
- the consequences of non-compliance with the removal order.

COMMENTARY

1. This Guideline provides, *inter alia*, that the removal order should be addressed in writing to the individual concerned, either in person or through his/her authorised representative. If this is not possible, the removal order should be sent by registered mail or other sure means to his/her last known address. Where the registered mail is not claimed, or where the authorised representative states that he/she has lost contact with the person concerned, the authorities should exercise due diligence to ensure that the order be adequately notified.
2. In some jurisdictions, the removal order will be considered to be notified (and thus the delays for seeking the annulment of the order to begin running) even where it is uncertain whether that order has effectively reached the addressee. This should only be the case where, in the course of previous proceedings, for instance the proceedings on the claim to asylum, it has been made clear to the person concerned that this rule would apply, and that he/she therefore should notify the authorities of any change of address, ensuring that he/she can be adequately notified at all times that he/she has been served with a removal order.
3. This Guideline encourages the member states to indicate in the removal order bodies from which further information may be obtained concerning the execution of the order. This information concerns the practical means of compliance with the removal order. The returnee could be given information as to, for instance, whether the state may contribute to the transportation costs, whether the returnee could benefit from any return programmes as referred to in Guideline 1, or whether an extension of the deadline to comply with the order may be obtained. In countries where removal orders do not contain such information, the provision of this information should be achieved without delay by other means.
4. The person, who is obliged to leave the territory of the host state, should be informed of the consequences of not complying with this obligation in order to encourage such a person to leave the territory of the host state voluntarily.
5. Some countries do not issue a separate removal order. The removal order, for instance, may be an integrated part of the refusal for asylum or residence permit, or of any other decision on the right to remain on the national territory. This Guideline should not be seen as an obstacle to this practice.

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

– the time-limits for exercising the remedy shall not be unreasonably short;

– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

3. The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1.

COMMENTARY

1. This Guideline is based on Article 13 ECHR. According to the European Court of Human Rights “Article 13 [in conjunction with a substantive provision of the ECHR, in particular with Article 2, Article 3, Article 8 or Article 4 of Protocol No. 4 ECHR] requires that States must make available to the individual concerned the effective possibility of challenging the removal order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality” (Eur. Ct. HR, *Shebashov v. Latvia* (dec.), 9 November 2000, Nb. 50065/99, unreported; Eur. Ct. HR (4th Sect.), *Al-Nashif v. Bulgaria* judgment of 20 June 2002 (Appl. No. 50963/99), para. 133).

2. This Guideline also builds on Recommendation No. R(98)13 of the Committee of Ministers to member states on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, adopted by the Committee of Ministers on 18 September 1998 on the 641st Meeting of the Ministers’ Deputies. However the Guideline develops further this recommendation by taking into account the fact that other hypotheses than the rejected asylum seeker are included among the situations where Article 13 ECHR guarantees a right to an effective remedy against a removal order.

3. In the countries which do not issue a separate removal order, the returnee will have the possibility of appealing the entire decision concerning his/her right to remain within the territory, including the decision on return. Thus a competent body may review the decision on return, although not separately.

Paragraph 1:

Although Article 13 ECHR does not require that the remedy be of a judicial nature, it must offer adequate guarantees. The European Court of Human Rights considers that “The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law. The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective” (Eur. Ct. HR (3rd Sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 75).

Paragraph 2:

1. With respect to the “required procedural guarantee”, it could be noted that in the case of *Al-Nashif v. Bulgaria*, the Court found that Article 13 ECHR had been violated where the removal order could not be effectively challenged as it was based on reasons related to national security, making it impossible for the competent Court to collect relevant evidence about the alleged national security reasons. The Court held that “Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual’s right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual’s rights must be examined” (Eur. Ct. HR (4th Sect.), *Al-Nashif v. Bulgaria* judgment of 20 June 2002 (Appl. No. 50963/99), para. 137-138).

2. The requirement that the time-limits for exercising the remedy shall not be unreasonably short is based on the statement of the European Court of Human Rights in the case of *Jabari v. Turkey*, where, confronted with the situation of an asylum-seeker who has missed the five-days time-limit within which an application against a removal order had to be launched, and whose application had therefore been dismissed, the Court considered that “the automatic and mechanical application of such short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention” (judgment of 11 July 2000, Appl. No. 40035/98, para. 40).

3. The reference made in the second indent of this paragraph to the relevant national rules regarding legal aid seeks to preserve the possibility, for the Member States who so choose, to grant legal aid subject to conditions they see fit, provided these are not discriminatory and remain in compliance with their

international obligations. It is to be noted, for instance, that some States limit the scope of free legal aid to persons who have an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in Guideline 2.1.

Paragraph 3:

1. The requirement according to which the exercise of the remedy should have the effect of suspending the execution of the removal order when the returnee has an arguable claim that he or she is subjected to treatment contrary to his or her human rights as set out in Guideline 2.1 is based on the judgment delivered by the European Court of Human Rights in the case of *Conka v. Belgium* (judgment of 5 February 2002, cited above, para. 79). It also seeks its inspiration from the more concise formulation of Recommendation No. R(98)13 of the Committee of Ministers to member states on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights. According to this Recommendation, “the execution of the expulsion order is suspended until a decision [by an independent authority having the competence to decide on the existence of the conditions provided for by Article 3 of the Convention] is taken”. Recommendation CommDH/Rec(2001)1 of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders (19 September 2001) states that the judicial remedy which may be exercised within the meaning of Article 13 ECHR when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR “must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 and 3 of the ECHR is alleged”.

2. These recommendations were anticipated by the Parliamentary Assembly of the Council of Europe in Recommendation 1236(1994) on the right of asylum, which insisted that asylum procedures provide that “while appeals are being processed, asylum-seekers may not be deported” (para. 8, ii, d)), and in Recommendation 1327(1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, urging the member states of the Council of Europe to “provide in their legislation that any judicial appeal should have suspensive effect” (para. 8, vii, f)).

Chapter III – Detention pending removal

Guideline 6. Conditions under which detention may be ordered

1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.
2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

COMMENTARY

This Guideline is based on Article 5 ECHR. At the time being there is no case-law of the European Court of Human Rights addressing detention issues in the course of removal operations involving several States. However, the Court has said that the notion of “deprivation of liberty” includes the detention in a transit (international) zone, which the alien may leave if he/she departs for another country willing to accept him/her⁵; that detention is justified for as long as strictly necessary for the enforcement of the removal order⁶.

Paragraph 1:

1. This paragraph starts by recalling that a person may be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, only in accordance with a procedure prescribed by law (on this requirement, see Eur. Ct. HR (3rd Sect.), *Shamsa v. Poland* judgment of 27 November 2003 (Appl. No. 45355/99 and no. 45357/99, para. 48-60).

2. The requirement of an individualized examination of the necessity to deprive a person of his/her liberty to ensure compliance with an order to leave the territory is part of a broader protection against arbitrariness in the way detention measures are adopted and derives from Article 5 ECHR

3. The guarantees afforded by Article 5 of the ECHR include that detention of the person should be limited to certain specific circumstances where there are objective reasons to believe that he/she will not comply with the order, for instance if the time limit for departing from the territory has passed and the alien has changed his/her place of residence without notifying the authorities of a change of address, if he/she has not complied with the measures adopted to ensure that he/she will not abscond, if he/she has in the past evaded removal. Detention should only be resorted to where other measures have failed or if there are reasons to believe that they will not suffice. These measures may include the surrendering of the passport or other identity documents to the authorities, an obligation to reside in a particular place or within a certain district, an obligation to report at regular intervals to the authorities, for instance to the closest police station, bail or sureties. As these measures constitute restrictions to the right to move freely and to choose one's residence or to the right to respect for private life, they will have to respect the conditions defined in Article 2(4) of Protocol No. 4 to the ECHR and Article 8(2) ECHR.

4. For purposes of deciding whether or not to detain a person pending removal, the impossibility to reach the person concerned could lead to a presumption that he/she has absconded and therefore should be held to ensure effective removal from the territory, only where the addressee of the removal order has been duly informed that he/she was under an obligation to inform the authorities about any change of residence.

Paragraph 2:

1. The second paragraph is based on Article 5(2) ECHR, which provides that “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. The need to offer this information requires either that it is described in written form in a translated document or that an oral interpretation be provided into a language the person concerned understands. The need to inform the person arrested pending his/her removal from the territory about the remedies against the lawfulness of his/her detention derives from Article 5(4) ECHR. Further information on remedies against detention is given in Guideline 9.

2. Member states are advised to ensure that the person detained be promptly informed of his/her rights as granted under the national regulations, beyond the minimal information that must be provided under Article 5(2) ECHR. This requirement can be identified per analogy from the recommendations made by the CPT with respect to persons taken into custody because of a suspicion that they may have committed an offence. The CPT notes in this regard that “Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence” (12th General Report (CPT/Inf(92)3), para. 44). This is also valid with respect to persons put into detention to ensure that they will be effectively removed from the national territory. The CPT has taken the view that “immigration detainees should be systematically provided

⁵ Eur. Ct. HR, *Amuur v. France* judgment of 25 June 1996, para. 42; Eur. Ct. HR (3rd Sect.), *Abdel Salam Shamsa v. Poland* and *Anwar Shamsa v. Poland* decisions of 5 December 2002 (Appl. No. 45355/99 and No. 45357/99), and the judgment of 27 November 2003 in those joined cases, para. 44-47.

⁶ see Eur. Ct. HR (4th Sect.), *Al-Nashif v. Bulgaria* judgment of 20 June 2002 (Appl. No. 50963/99), para. 92: “... everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement”.

with a document explaining the procedure applicable to them and setting out their rights. This document should be available in the languages most commonly spoken by those concerned and, if necessary, recourse should be had to the services of an interpreter” (7th General Report (CPT/Inf(97)10), para. 30).

3. The CPT has repeatedly insisted on the need to recognise a right of access to a lawyer from the very outset of custody. It has also emphasized the point that a doctor should be called without delay if a person requests a medical examination. Finally, the CPT considers that a detained person should have a right to have the fact of his/her detention notified to a third party, from the very outset of police custody. The CPT considers that “the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest” (12th General Report (CPT/Inf(92)3), para. 40-43). Where a person is arrested with a view to carrying out the removal of that person from the territory, the immediate possibility of accessing right of access to a lawyer also serves another function, which is to ensure that the remedy available against the deprivation of liberty will be effective: this is important considering that Article 5(4) ECHR requires a speedy process for challenging the lawfulness of detention. It will be noted at last that the possibility for the person arrested with a view to enforcing the removal order delivered against him/her to contact a lawyer and a third person to inform that person of the arrest, is of even higher importance here, because of the potentially irreversible character of the execution against that person of the removal order; therefore, any security concerns, or concerns for the effectiveness of the investigation, which may justify that certain limitations be brought to this right with regard to persons arrested upon the suspicion that they have committed criminal offences, will not normally be present here, or will normally not have the same weight.

Guideline 7. Obligation to release where the removal arrangements are halted

Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.

COMMENTARY

The rule formulated in this Guideline derives from the fact that Article 5(1) ECHR imposes a restrictive reading of the situations where such deprivation of liberty is authorised, as these are exceptions to the fundamental right to liberty and security. The European Court of Human Rights has recalled that “any deprivation of liberty under Article 5 para. 1(f) ECHR will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1(f)” (Eur. Ct. HR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, para. 113). Indeed, this implies that when it appears that the removal of the person within a reasonable period is unrealistic, the detention ceases to be justified and release must follow (Eur. Commiss. HR, *Caprino v. the United Kingdom*, Appl. No. 6871/75, dec. of 3 March 1978, *YB ECHR*, 21, p. 285, 295-296 (and *DR*, 12, p. 14)). The Human Rights Committee adopts a similar attitude under Article 9(1) of the International Covenant on Civil and Political Rights. In *Jalloh v. the Netherlands*, it expressed the view that Article 9(1) ICCPR had not been violated, because “Once a reasonable prospect of expelling [the author of the communication] no longer existed his detention was terminated” (communication No. 794/1998, final views of 23 March 2002). The Human Rights Committee also considers that Article 9 ICCPR excludes detention for extended periods when deportation might be impossible for legal or other considerations (see e.g., Concluding Observations relating to the United Kingdom, (2001) UN doc. CCPR/CO/73/UK, para. 16).

Guideline 8. Length of detention

1. Any detention pending removal shall be for as short a period as possible.
2. In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

COMMENTARY

This Guideline seeks to draw the consequences from the fact that the deprivation of liberty of the alien with a view to his/her removal must not be arbitrary (Article 5 ECHR). The detention of a person, under Article 5(1), f), ECHR, may be justified by the need to ensure that the returnee will comply with the removal order. The national authorities are under an obligation to exercise due diligence to ensure that this period of detention is limited to the shortest possible time. Although it is not required under Article 5 ECHR that a decision to detain a person be taken by a judge, it nevertheless requires that there must be a possibility to challenge it before a judicial authority. This has been confirmed by the European Court of Human Rights in the case of *Shamsa v. Poland* (Eur. Ct. HR (3rd Sect.), *Shamsa v. Poland* judgment of 27 November 2003 (Appl. No. 45355/99 and No. 45357/99), para. 58-59).

Guideline 9. Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.
2. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.

COMMENTARY

1. This Guideline follows immediately from the case-law of the European Court of Human under Article 5 of the Convention.
2. Regarding the “accessibility” of the remedy referred to in the second paragraph, it could be recalled that in the case of *Conka v. Belgium*, the European Court of Human Rights identified a number of factors which, in its view, “undoubtedly affected the accessibility of the remedy”. “These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them and although he was present at the police station, he did not stay with them at the closed centre; in those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter’s services; despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre. Whatever the position – and this factor is decisive in the eyes of the Court – as the applicants’ lawyer explained at the hearing without the Government contesting the point, he was only informed of the events in issue and of his clients’ situation at 10.30 p.m. on Friday, 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, a day after the applicants’ expulsion on 5 October. Thus, (...), he was unable to lodge an appeal with the committals division (...)” (Eur. Ct. HR (3rd Sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 44-45).
3. With regard to legal aid, reference can be made to comments laid down under Guideline 5.

Guideline 10. Conditions of detention pending removal

1. Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.
2. Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a "carceral" environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.
3. Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.
4. Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.
5. National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.
6. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.
7. Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.

COMMENTARY

1. The wording used in the first three paragraphs of this Guideline was inspired from the 7th General Report of the CPT (CPT/Inf(97)10, para. 29). These paragraphs also build upon the Recommendation (CommDH/Rec(2001)1) of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of removal orders (19 September 2001), especially paragraphs 7, 9 and 10 and upon Parliamentary Assembly Recommendation 1547(2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, especially para. 13, v, d).

2. In the above mentioned report, the CPT expressed the view that “in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel” (7th General Report (CPT/Inf(97)10), para. 29).

3. Paragraph 4 of this Guideline is self-explanatory. With the exception of the term “normally”, the recommendation not to hold together persons detained pending their removal with ordinary prisoners reflects a similar recommendation to the Parliamentary Assembly (Recommendation 1547(2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, para. 13, v, b and c) and to the Recommendation Rec(2003)5 of the Committee of Ministers to the member states on measures of detention of asylum seekers (para. 10).

4. The fifth paragraph contains requirements which may be partly derived from Article 5(4) ECHR. In particular, the possibility for the persons detained in a centre to contact a lawyer is essential for the effectiveness of the right to request a judicial review of the detention. In the CPT's views “the right of access to a lawyer should apply throughout the detention period and include both the right to speak with the lawyer in private and to have him present during interviews with the authorities concerned” (7th General Report (CPT/Inf(97)10), para. 31). With a view to ensuring that this right can be exercised, various practical measures should be taken.

5. The last sentence of this paragraph calls for a monitoring of the facilities by the competent national administrative or judicial authorities. Such monitoring should involve independent monitors such as, for example, national commissions, ombudspersons, or members of parliament.

6. The sixth paragraph states a usual guarantee against the risk of abuse or ill-treatment. The second sentence is founded on Article 13 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. This provides that “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given”. Under Article 16 of the same Convention this rule also applies with the substitution of the reference to other forms of cruel, inhuman or degrading treatment or punishment to the reference to torture. The European Court of Human Rights interprets Article 3 ECHR in the same manner.

7. The last paragraph is in line with the general approach of these Guidelines, which emphasize the transparency of the return procedures and the accountability of all the agents involved. For a returnee to have access to adequate information about his rights and about available opportunities is an essential condition for being able to exercise these rights effectively and to benefit from these opportunities.

Guideline 11. Children and families

1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.
3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities appropriate to their age. The provision of education could be subject to the length of their stay.
4. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.
5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal.

COMMENTARY

1. Paragraphs 1, 3 and 5 of this Guideline are inspired from the relevant provisions of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and ratified by all the member states of the Council of Europe. With respect to paragraph 2, it could be recalled that the right to respect for family life granted under Article 8 ECHR also applies in the context of detention.
2. Concerning the deprivation of liberty of children, Article 37 of the Convention on the Rights of the Child provides in particular that “arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time” (Art. 37(b). According to Article 20(1) of this Convention, “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”.
3. Inspiration was also found in para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990, which apply to any deprivation of liberty, understood as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority” (para. 11, b)). According to para. 38: “Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education”.
4. The last paragraph reflects the guiding principle of the Convention on the rights of the child whose Article 3(1) states that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. As a matter of course, this also applies to decisions concerning the holding of children facing removal from the territory.

Chapter IV – Readmission

Guideline 12. Cooperation between states

1. The host state and the state of return shall cooperate in order to facilitate the return of foreigners who are found to be staying illegally in the host state.
2. In carrying out such cooperation, the host state and the state of return shall respect the restrictions imposed on the processing of personal data relating to the reasons for which a person is being returned. The state of origin is under the same obligation where its authorities are contacted with a view to establishing the identity, the nationality or place of residence of the returnee.
3. The restrictions imposed on the processing of such personal data are without prejudice to any exchange of information which may take place in the context of judicial or police cooperation, where the necessary safeguards are provided.
4. The host state shall exercise due diligence to ensure that the exchange of information between its authorities and the authorities of the state of return will not put the returnee, or his/her relatives, in danger upon return. In particular, the host state should not share information relating to the asylum application.

COMMENTARY

1. For the purpose of establishing the identity, the nationality, or the usual place of residence of the foreigner found to be illegally staying on the territory of the host state, the authorities of this state may have to contact the diplomatic representation of the state of origin, or have their diplomatic representation in the state of origin contact the local authorities in that state. They may transmit for such purposes any documentation relevant to the determination of the identity, the nationality, or the place of residence of the returnee, such as identity documents, documents proving the nationality, [including documents which do not prove identity or nationality by themselves, but which may help to establish it along with other documents], driving licences, or biometric data including a facial photograph and fingerprints. In certain cases, the person may have to be presented before the diplomatic representation of the state believed to be his/her state of origin, for the sake of determining his/her identity. The person concerned as well as the authorities of the state of origin should be informed that in no circumstance is the returnee under an obligation to reveal in which circumstances he/she arrived in the host state, or whether he/she claimed asylum. Similarly, if such information is requested in a questionnaire proposed by the authorities of the state thought to be the state of origin, the person concerned should be informed that he/she has a right not to give such information.
2. In the framework of their duty to cooperate, the states of return and of origin shall assist the host state, in particular, in establishing the nationality and the identity of the person concerned and shall issue the travel documents required for implementing return, at the request of the host state.
3. The only reason the authorities of the host state should give to the authorities of the state of origin or the state of return, in principle through the diplomatic representation of that state in the host state, when applying for a travel document, is that the person for whom the travel document is requested is not authorised to stay further on the national territory. Whether the person has applied for asylum or not is not relevant information for the obtaining of such travel documents. The criminal records of the returnee, or whether he/she has been convicted in the host state, should only be transmitted where this is in accordance with usual rules on judicial and police cooperation and with all relevant applicable laws.
4. The authorities of the host state may inform the authorities of the state of origin, to which the person concerned is returned, of the measures taken, "to ensure the expelled persons are not considered criminals" (Parliamentary Assembly Recommendation 1547(2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, para. 13, vii).

Guideline 13. States' obligations

1. The state of origin shall respect its obligation under international law to readmit its own nationals without formalities, delays or obstacles, and cooperate with the host state in determining the nationality of the returnee in order to permit his/her return. The same obligation is imposed on states of return where they are bound by a readmission agreement and are, in application thereof, requested to readmit persons illegally residing on the territory of the host (requesting) state.
2. When requested by the host state to deliver documents to facilitate return, the authorities of the state of origin or of the state of return should not enquire about the reasons for the return or the circumstances which led the authorities of the host state to make such a request and should not require the consent of the returnee to return to the state of origin.
3. The state of origin or the state of return should take into account the principle of family unity, in particular in relation to the admission of family members of the returnees not possessing its nationality.
4. The state of origin or the state of return shall refrain from applying any sanctions against returnees:
 - on account of their having filed asylum applications or sought other forms of protection in another country;
 - on account of their having committed offences in another country for which they have been finally convicted or acquitted in accordance with the law and penal procedure of each country; or
 - on account of their having illegally entered into, or remained in, the host state.

COMMENTARY

This Guideline is closely inspired by Recommendation No. R(99)12 of the Committee of Ministers to member states on the return of rejected asylum-seekers.

Paragraph 1:

1. This paragraph derives from the right of every person not to be arbitrarily deprived of the right to enter his own country (Article 12(4) ICCPR; Article 3(2) of Protocol No. 4 ECHR). The Human Rights Committee has noted that Article 12(4) of the International Covenant on Civil and Political Rights “includes not only the right to return after having left one’s own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person’s State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation” (General Comment 27, “Article 12”, adopted on 2 November 1999, para. 19). Moreover, Article 12(2) ICCPR guarantees the right to leave “any country, including his own”. This implies that a person residing in a country of which he/she is not a national should be able to leave that country. According to the Human Rights Committee: “Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere” (General Comment 27, cited above, para. 9).

2. Where a readmission agreement is applicable between the host state and the state of origin or return, the readmission takes place on the basis of the terms of such an agreement, or as otherwise agreed by the parties.

Paragraph 2:

The paragraph provides, *inter alia*, that the authorities of the state of origin or of the state of return should not enquire about the reasons for the return or the circumstances which lead the authorities of the host state to request the delivery of documents to facilitate the return. This is not only a means to guarantee that the returnee will be effectively protected from any form of reprisal intimidation or prosecution for having been returned by the host state. It is also a requirement flowing from the duty of all states not to process personal data for illegitimate purposes and only to process data which are adequate, relevant, and not excessive in relation to the purposes for which they are processed (Article 17 ICCPR; Article 8 ECHR; Article 5 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981 (ETS No. 108)).

Paragraph 3:

It derives from the right to respect for family life (Article 17 ICCPR; Article 8 ECHR). Under Article 8 ECHR, the Contracting Parties may be under an obligation to authorise non-nationals to enter on to their national territory and reside there with their family, if the family life cannot be pursued elsewhere, unless the interest of the state in controlling immigration predominates over the interest of the persons concerned to pursue their family life⁷.

Paragraph 4:

1. The first indent derives from a combined reading of Article 12(2) (freedom to leave one’s own country) and Article 19(2) (freedom of expression) of the International Covenant on Political and Civil Rights.

2. The second indent derives from the *non bis in idem* principle.

3. The obligation described in the third indent is without prejudice of the right of the authorities of the state of return to prosecute the returnee for any offences he/she may have committed, for which he/she has not been prosecuted or has not been convicted or acquitted either in that state or in any other state, including the host state from which he/she is expelled. It is also without prejudice of the application of supervisory measures by the authorities of the state of return.

⁷ see, *inter alia*, Eur. Ct. HR, *Gül v. Switzerland* judgment of 19 February 1996, *Rep.*, 1996-I, p. 73; Eur. Ct. HR, *Ahmut v. the Netherlands* judgment of 28 November 1996, *Rep.*, 1996-VI, p. 2030; Eur. Ct. HR, *Sen v. the Netherlands* judgment of 21 December 2001, Appl. No. 31465/96, para. 41.

Guideline 14. Statelessness

The state of origin shall not arbitrarily deprive the person concerned of its nationality, in particular where this would lead to a situation of statelessness. Nor shall the state of origin permit the renunciation of nationality when this may lead, for the person possessing this state's nationality, to a situation of statelessness which could then be used to prevent his or her return.

COMMENTARY

1. The first sentence of this Guideline has been inspired by Article 15(2) of the Universal Declaration of Human Rights of 10 December 1948 which states “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”.
2. Further, the United Nations Resolution A/RES/50/152 adopted by the General Assembly on 9 February 1996 calls upon the States to adopt nationality legislation with a view to reducing statelessness, in line with principles of international law in particular by preventing arbitrary deprivation of nationality.
3. Finally it derives from Recommendation of the Committee of Ministers No. R(99)18 on the avoidance and reduction of statelessness that takes into account the 1954 United Nations Convention relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness and hopes that “as many member States as possible will soon sign and ratify the 1997 European Convention on nationality”. It recommends, *inter alia*, that the governments avoid and reduce statelessness, that they avoid arbitrary deprivation of nationality and ensure that the renunciation to nationality will not take place without the possession, actual acquisition or guarantee of acquisition of another nationality.
4. Article 12(4) ICCPR, that guarantees the right to enter one’s own country, is relevant in this context. The Human Rights Committee has noted in that respect that “A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country” (General Comment 27, “Article 12”, adopted on 2 November 1999, para. 21). Although a state may deny a passport requested by a person claiming to be its national, it must at least make the necessary investigations to discover whether a person has, or does not have, the nationality of that country (Human Rights Committee, *J.M. v. Jamaica*, communication No. 165/84, final views of 26 March 1986).
5. With respect to the last sentence of this Guideline, an exemplary case presented to the European Court of Human Rights in this respect was *Mogos and Krifka v. Germany*, where the applicants had voluntarily waived their Romanian nationality to become stateless, thereby avoiding expulsion to their state of origin, until Germany could find an agreement with Romania concerning a few hundreds of persons in similar situations which Romania agreed to readmit and the naturalisation of whom it agreed to facilitate (Eur. Ct. HR, *Mogos and Krifka v. Germany*, dec. of 27 March 2003, Appl. No. 78084/01).
6. Although Article 31 of the Convention relating to the Status of Stateless Persons adopted on 28 September 1954 by the Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A(XVII) of 26 April 1954 imposes certain conditions for the removal of stateless persons, this provision does not prohibit the removal of such persons; however no removal will in practice be possible if no State accepts to admit those stateless persons on its territory.

Chapter V – Forced removals

Guideline 15. Cooperation with returnees

1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.
2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be given information in advance about the removal arrangements and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.

COMMENTARY

1. The removal operations should develop, insofar as possible, with the cooperation of the returnee, even where a form of supervised or forced return is organised as a result of the choice of the returnee not to voluntarily comply with the removal order. When a returnee has not been convinced by a voluntary return programme to voluntarily comply with the removal order, it will be advisable not to rely simply on the threat to use coercive measures.

2. The second paragraph of this Guideline is best explained by quoting from the 13th General Report of the CPT (CPT/Inf(2003)35, para. 41): "Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts. It is essential that immigration detainees be informed sufficiently far in advance of their prospective deportation, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. The CPT has observed that a constant threat of forcible deportation hanging over detainees who have received no prior information about the date of their deportation can bring about a condition of anxiety that comes to a head during deportation and may often turn into a violent agitated state. In this connection, the CPT has noted that, in some of the countries visited, there was a psycho-social service attached to the units responsible for deportation operations, staffed by psychologists and social workers who were responsible, in particular, for preparing immigration detainees for their deportation (through ongoing dialogue, contacts with the family in the country of destination, etc.). Needless to say, the CPT welcomes these initiatives and invites those States which have not already done so to set up such services".

Guideline 16. Fitness for travel and medical examination

1. Persons shall not be removed as long as they are medically unfit to travel.
2. Member states are encouraged to perform a medical examination prior to removal on all returnees either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen.
3. A medical examination should be offered to persons who have been the subject of a removal operation which has been interrupted due to their resistance in cases where force had to be used by the escorts.
4. Host states are encouraged to have "fit-to-fly" declarations issued in cases of removal by air.

COMMENTARY

1. The first paragraph of this Guideline derives from rights guaranteed under Articles 2 and 3 ECHR. The Guideline takes into account the recommendations made by the CPT that has emphasised the “importance of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented” (13th General Report (CPT/Inf(2003)35), para. 39).
2. Medical examination and transfer of medical information should only be carried out in accordance with human rights and relevant personal data protection legislation.
3. With respect to medical examination to be offered to persons who have been the subject of an abortive deportation operation, the CPT has found that: “ In this way it will be possible to verify the state of health of the person concerned and, if necessary, establish a certificate attesting to any injuries. Such a measure could also protect escort staff against unfounded allegations” (13th General Report (CPT/Inf(2003)35), para. 39).
4. Without stating this as an obligation, this Guideline also encourages states to have “fit-to-fly” declarations systematically delivered before a removal by air.

Guideline 17. Dignity and safety

While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.

COMMENTARY

This Guideline emphasises that the return operation should not be presented to the escort as having to succeed “at all costs”. The safety of the returnee, of the other passengers and of the crew members shall be paramount in the removal process. If the attempt to remove the returnee fails because his/her resistance brings into question the safety of the returnee, of the other passengers, and/or of the crew, the operation may be interrupted and the person concerned returned to detention. In its 13th General Report CPT expressed its view that it is also beneficial if each deportation operation where difficulties are foreseeable is monitored by a manager from the competent unit, able to interrupt the operation at any time (CPT/Inf(2003)35, para. 45).

Guideline 18. Use of escorts

1. The authorities of the host state are responsible for the actions of escorts acting on their instruction, whether these people are state employees or employed by a private contractor.
2. Escort staff should be carefully selected and receive adequate training, including in the proper use of restraint techniques. The escort should be given adequate information about the returnee to enable the removal to be conducted safely, and should be able to communicate with the returnee. Member states are encouraged to ensure that at least one escort should be of the same sex as that of the returnee.
3. Contact should be established between the members of the escort and the returnee before the removal.
4. The members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.

COMMENTARY

Paragraph 1:

1. According to this paragraph member States are allowed to use either state employees or private contractors to implement return operations. Privatization should not lead the public authorities to escape or diminish their responsibilities.

Paragraph 2:

1. The principle under paragraph 2 requires, *inter alia*, that the escorts in charge of forced returns should be composed of specially trained members (see also the 13th General Report of the CPT (CPT/Inf(2003)35), para. 42). Such training could comprise training in intercultural communication, stress management, and in the legal and medical aspects of the removal operation. A number of states have made progress in this area since a few years. The CPT has noted that "certain management strategies had had a beneficial effect: the assignment of escort duties to staff who volunteered, combined with compulsory rotation (in order to avoid professional exhaustion syndrome and the risks related to routine, and ensure that the staff concerned maintained a certain emotional distance from the operational activities in which they were involved) as well as provision, on request, of specialised psychological support for staff".

2. The recommendation according to which the escort should comprise at least one person of the same sex as that of the returnee is based on the consideration that this may facilitate communication between the returnee and the escort; in certain situations, it may help preserve the dignity and intimacy of the returnee; it also constitutes a confidence-building measure.

Paragraph 3:

1. This paragraph is based on the assumption that the lack of communication between the members of the escort and the returnee often explains panicked reactions from the returnee, especially when he/she has been given no or insufficient information about the procedure of return and the situation he/she will be confronted with in the country to which he/she is returned. Such a lack of communication may also result in a lack of respect on the part of the escort members for the returnee, leading sometimes to dehumanisation. Therefore, some contact between the escort and the returnee should take place before the actual return operation begins, if at all practicable.

Paragraph 4:

1. According to this paragraph, the members of the escort should be identifiable. For instance, the members of the escort could present themselves by name or they could have their name or a number indicated on a badge. The wearing of hoods or masks by the members of the escort should be prohibited, as this may accentuate the anxiety of the returnee, limit the possibilities of adequate communication between the members of the escort and the returnee and make it more difficult or impossible to ascertain who is responsible in the event of allegations of ill-treatment.

2. It will be noted that the Guidelines do not offer an opinion on the question whether the return operation should be carried out using regular (scheduled) flights, or chartered flights in cargo or military planes. The standards of the Council of Europe, and in particular Article 4 of Protocol No. 4 ECHR, do not express a prohibition with respect to either means of effectuating removals by air. Each formula presents both advantages and disadvantages. Member States remain free in deciding in which way the removal operation should be implemented. Such a decision is without prejudice to the fact that the removal operation shall be conducted in full respect of the rights guaranteed by the ECHR.

Guideline 19. Means of restraint

1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.
2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.
3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or Guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.
4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case.

COMMENTARY

1. This Guideline signifies that the escort may use coercive measures on individuals who refuse or resist the removal only if they are proportionate and do not exceed reasonable force. This requirement of proportionality is expressed by the European Court of Human Rights under Article 3 ECHR, with respect to which it noted that “In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3”, but that the use of force may be made necessary, provided it was not excessive, by the conduct of the person against whom force is used (Eur. Ct. HR (4th Sect.), *Berlinski v. Poland* judgment of 20 June 2002 (Appl. No. 27715/95 and No. 30209/96), para. 59-65).

2. The requirement to administer medication only “on the basis of a medical decision” sets out in paragraph 4 of the Guideline is also a requirement of Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Medicine, signed in Oviedo on 4 April 1997 (ETS No. 164). Medicine should also be provided if there is a case of medical need on the part of the returnee.

3. This Guideline was inspired from the following extracts of the 13th General Report of the CPT (CPT/Inf(2003)35 – footnotes have been omitted):

“33. Clearly, one of the key issues arising when a deportation operation is carried out is the use of force and means of restraint by escort staff. The CPT acknowledges that such staff are, on occasion, obliged to use force and means of restraint in order to effectively carry out the deportation; however, the force and the means of restraint used should be no more than § reasonably necessary. The CPT welcomes the fact that in some countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness.

34. The question of the use of force and means of restraint arises from the moment the detainee concerned is taken out of the cell in which he/she is being held pending deportation (whether that cell is located on airport premises, in a holding facility, in a prison or a police station). The techniques used by escort personnel to immobilise the person to whom means of physical restraint – such as steel handcuffs or plastic strips – are to be applied deserve special attention. In most cases, the detainee will be in full possession of his/her physical faculties and able to resist handcuffing violently. In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilisation of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia.

There is a similar risk when a deportee, having been placed on a seat in the aircraft, struggles and the escort staff, by applying force, oblige him/her to bend forward, head between the knees, thus strongly compressing the ribcage. In some countries, the use of force to make the person concerned bend double in this way in the passenger seat is, as a rule, prohibited, this method of immobilisation being permitted only if it is absolutely indispensable in order to carry out a specific, brief, authorised operation, such as putting on, checking or taking off handcuffs, and only for the duration strictly necessary for this purpose.

The CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of Guidelines designed to reduce to a minimum the risks to the health of the person concerned.

35. The CPT has noted with interest the directives in force in certain countries, according to which means of restraint must be removed during the flight (as soon as take-off has been completed). If, exceptionally, the means of restraint had to be left in place, because the deportee continued to act aggressively, the escort staff were instructed to cover the foreigner’s limbs with a blanket (such as that normally issued to passengers), so as to conceal the means of restraint from other passengers.

On the other hand, instructions such as those followed until recently in one of the countries visited in connection with the most problematic deportation operations, whereby the persons concerned were

made to wear nappies and prevented from using the toilet throughout the flight on account of their presumed dangerousness, can only lead to a degrading situation.

36. In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systematically recommended an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly. [...] It notes that this practice is now expressly prohibited in many States Parties and invites States which have not already done so to introduce binding provisions in this respect without further delay.

37. It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew.

Account should also be taken of the health risks connected with the so-called "economy-class syndrome" in the case of persons who are confined to their seats for long periods.

38. [...] The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft. The use of such gases in very confined spaces, such as cells, entails manifest risks to the health of both the detainee and the staff concerned. Staff should be trained in other control techniques (for instance, manual control techniques or the use of shields) to immobilise a recalcitrant detainee."

"40. During many visits, the CPT has heard allegations that immigration detainees had been injected with medication having a tranquillising or sedative effect, in order to ensure that their deportation proceeded without difficulty. On the other hand, it also noted in certain countries that instructions prohibited the administration, against the will of the person concerned, of tranquillisers or other medication designed to bring him or her under control. The CPT considers that the administration of medication to persons subject to a deportation order must always be carried out on the basis of a medical decision taken in respect of each particular case. Save for clearly and strictly defined exceptional circumstances, medication should only be administered with the informed consent of the person concerned".

Guideline 20. Monitoring and remedies

1. Member states should implement an effective system for monitoring forced returns.
2. Suitable monitoring devices should also be considered where necessary.
3. The forced return operation should be fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data.
4. If the returnee lodges a complaint against any alleged ill-treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.

COMMENTARY

Paragraph 1:

1. The first paragraph is built upon the idea that effective monitoring of removal operations reinforces the accountability of those responsible for implementing.
2. Various possibilities exist to monitor removal operations. In some member states, an independent form of monitoring has been organised.
3. For instance, an NGO provided the Working Party on Expulsion Procedures with the following explanation on how it undertakes the monitoring of removal operations:
 4. "Usually the staff of the office in charge of the removal monitoring receives timely information about the removal operations that are being scheduled for a near future. Having received these pieces of information the monitor might decide to discuss the removal in advance with the police officers and state representatives involved. Already at this stage the monitor might be able to deliver important information about the returnee's situation.
 5. The actual process of monitoring starts when the returnee is handed over by the authority for aliens to the police for transportation by air and generally ends with the take-off of the plane. However, if the removal is carried out by an official governmental flight the monitor can also enter the plane and might sometimes even be able to accompany the flight (to date the monitor has done so once). In these situations the monitoring period even extends to the arrival in the country of destination.
 6. The monitor is visible and approachable for the returnee but generally does not take any action on his or her own initiative unless considered necessary to ensure the proper process of the removal and to safeguard the observance of the deportee's rights. The monitor has access to all areas used for removal operations. While the operation takes place the monitor seeks to conduct a constant dialogue with all participants, in particular with the police officers who carry out the removal.
 7. If necessary the monitor will point at changes in the returnee's situation which might lead to the removal being inadequate or illegal. It is also possible for the monitor to organise contact with lawyers, e.g. in situations where the removal order is still under judicial review. If the deportee so wishes the monitor organises contact with the airport chaplaincy for pastoral care. In practical terms, the monitor sees that the returnees receive proper catering before and during the flights and organises proper storage of the returnee's belongings. The state authorities have ordered by decree that a small amount of cash (€50) can be offered to returnees without means in order to provide them with the necessary means to reach their regions of origin. The monitoring service makes sure that the cash is handed out to the returnees and might provide similar financial means from its own resources.
 8. The monitor will document each removal operation and regularly report to a mixed committee composed of officials and NGO representatives. He or she will furthermore deliver regular information to the authorities. Hence, the monitor sensitises the authorities involved with regard to the problems related to removal. The monitor regularly attends training sessions for the federal police.
 9. All those participating in the monitoring process, whether state officials or representatives of NGO's agree that monitoring has contributed to making the process of removal more transparent, thereby decreasing the use of force and violence during the operations. At the same time the implementation of international human rights standards has improved."
 10. Although the return operations should, insofar as possible, be conducted in a transparent and open manner, there are limits to monitoring by the media which it may be important to recall. Indeed, where the presence of the media is envisaged to ensure full transparency of the deportation operation, the requirements of the presumption of innocence (Article 6(2) ECHR) and of the right to respect for private life (Article 8 ECHR) should be taken into account. The need to guarantee the presumption of innocence of the concerned persons may justify imposing restrictions on the media who may be tempted to reveal the name of the officers having taken part in a deportation, where a criminal procedure is launched against them after allegations of ill-treatment. In the case of *"Wirtschafts-Trend" Zeitschriften-Verlags GmbH v. Austria*, the European Court of Human Rights concluded that the application of an editor was manifestly ill-founded and therefore inadmissible, in a situation where he was fined for having revealed the name of officers accused of being criminally liable for the death of an expelled asylum-seeker from Niger. The Court said that although

“the subject-matter of the present article was an issue of public concern and was part of a political debate on the lawfulness of deportation practices in Austria”, however, the report “also contained information on criminal proceedings against the police officers, which were pending at an early stage”. Observing that “the applicant company was not prevented from reporting about all details concerning the issue except for the full name of the police officer”, the Court noted that “the disclosure of his full name did not add anything of public interest to the information already given in the article that could have outweighed the interests of the person concerned in non-disclosure of his identity”; it concluded that the imposition of a modest fine to the editor for having unnecessarily published the name of the police officer concerned did not constitute a disproportionate interference with his freedom of expression (Eur. Ct. HR (3rd Sect.), “*Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*” decision of 14 November 2002 (Appl. No. 62746/00)). The principles applicable are summarized in the Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, adopted by the Committee of Ministers on 10 July 2003 at the 848th Meeting of the Ministers’ Deputies (see especially principles 2 (Presumption of innocence) and 8 (Protection of privacy in the context of on-going criminal proceedings)).

Paragraph 2:

The monitoring devices referred to are diverse. The authorities could consider installing video cameras to monitor the most sensitive areas where the return operation takes place, especially the corridor leading to the tarmac. The most delicate phases could be videotaped, especially the departure from the holding centre where the returnee has been detained, the travel towards the airport, and the boarding of the aircraft. Although the risk of such views are partial and not capable of fully representing the reality, the advantages such video recording presents, also in the event of false allegations of ill-treatment, must be weighed against the possible lacunae or disadvantages.

Paragraph 3:

1. The third paragraph provides for the removal operation to be fully documented. A practical way to achieve this is to ensure that a complete report be submitted to the hierarchical superiors of the officers in charge. In this report, each significant incident should be described and precisely located in time. Any significant action taken by the escort, concerning especially the use and removal of means of constraint, should be described, and the member of the escort responsible for the decision and the implementation identified.
2. Medical information collected either before the removal operation, or after a failed attempt at removal, or both (see Guideline 16), may have to be kept in a separate file.

Paragraph 4:

The necessity for an effective and independent investigation to be conducted when a returnee lodges a complaint for ill treatment is a requirement of the European Convention on Human Rights, and of its Article 3 in particular.

Appendix

Definitions

For the purpose of these guidelines, the following definitions apply:

- State of origin: the state of which the returnee is a national, or where he/she permanently resided legally before entering the host state;
- State of return: the state to which a person is returned;
- Host state: the state where a non-national of that state has arrived, and/or has sojourned or resided either legally or illegally, before being served with a removal order;
- Illegal resident: a person who does not fulfil, or no longer fulfils, the conditions for entry, presence in, or residence on the territory of the host state;
- Returnee: any non-national who is subject to a removal order or is willing to return voluntarily;
- Return: the process of going back to one's state of origin, transit or other third state, including preparation and implementation. The return may be voluntary or enforced;
- Voluntary return: the assisted or independent departure to the state of origin, transit or another third state based on the will of the returnee;
- Assisted voluntary return: the return of a non-national with the assistance of the International Organization for Migration (IOM) or other organisations officially entrusted with this mission;
- Supervised voluntary return: any return which is executed under direct supervision and control of the national authorities of the host state, with the consent of the returnee and therefore without coercive measures;
- Forced return: the compulsory return to the state of origin, transit or other third state, on the basis of an administrative or judicial act;
- Removal: act of enforcement of the removal order, which means the physical transfer out of the host country;
- Removal order: administrative or judicial decision providing the legal basis of the removal;
- Readmission: act by a state accepting the re-entry of an individual (own nationals, third country nationals or stateless persons), who has been found illegally entering, being present in or residing in another state;
- Readmission agreement: agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not or no longer fulfil the conditions of entry to, presence in or residence in the requesting state;
- Separated children: children separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.

COMMENTARY

1. The legal significations of terms and concepts used in the field of expulsion or forced return differ to a great extent amongst Member states of the Council of Europe. In addition, issues linked with expulsion procedures have already been addressed in other international fora, in particular at the EU level. With a view to reducing the risk of confusion on terminology and to facilitate the use of the Guidelines for those member states that are taking part in those fora, it was decided that the Guidelines should use a terminology similar to the one adopted by the EU.

2. Consequently the “Definitions” part that appears as an annex to the Guidelines was inspired from the Commission of the European Communities’ Communication on a Community return policy on illegal residents (COM(2002)564). Apart from few formal modifications, the only distinctions between the definitions used in the Guidelines and the ones used in the Communication concern terms that were not defined in the Communication (these are: state of origin, state of return, host state, returnee, assisted voluntary return, supervised voluntary return, separated children).