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**JRS' Memorandum for Portugal's European Union Presidency (July-December 2007)
about the EU Directive on Return¹**

The Jesuit Refugee Service (JRS) is a Catholic non-governmental organisation, which was founded in 1980 and whose mission is to accompany, serve and defend the rights of refugees and forcibly displaced people regardless of their religious affiliations. The regional office of JRS in Brussels networks with staff members in 22 European countries.

On 1st July 2007, Portugal took over the presidency of the European Union with, among other objectives, the will to contribute to the strengthening of the Area of Freedom and Security. In this field of primary importance for the future of a more harmonised Union, the Portuguese Presidency set out clear priorities.²

As regards "illegal migration", **JRS welcomes the Portuguese Presidency's commitment to examine the proposal for a Directive on "common standards and procedures in Member States for returning illegally staying third-country nationals."**³ There is a need to establish common European regulations for return, which respect fundamental rights and refugee protection rights.

This memorandum contains views and recommendations on the European Parliament's report on setting common standards for returning illegally staying third country nationals adopted by the LIBE Committee on 11th September, and to be voted in plenary on 28th November 2007.⁴

Applicability of the Return Directive to Transit Zones

Firstly, JRS continues to regret that the Directive allows Member States not to apply to transit zones and borders all the guarantees that it normally foresees.⁵ It is still worth recalling that the European Court on Human Rights stated in the *Amuur v. France* judgment⁶ that transit zones are places of detention in the same way as closed centres located within the territory of Member States. The inapplicability of this Directive to transit zones may lead to the failure of Member States to respect the principle of *non-refoulement* and important safeguards included in the Directive, such as the right to an effective remedy, would not be guaranteed to persons in such areas. Furthermore, the inapplicability of this Directive would cause incoherence with other Directives, such as the Asylum Procedures Directive, which *do*

¹ Revised memorandum, based on the decisions of the LIBE committee on 11th September 2007

² <http://www.eu2007.pt/UE/vEN/Politic/JAI/mai.htm>

³ COM (2005) 391

⁴ A probable part-session has been scheduled by the DG of the Presidency for that date:

<http://www.europarl.europa.eu/oeil/file.jsp?id=5269672>

⁵ LIBE committee compromise amendment 14 of Article 2(2)

⁶ ECHR, *Mahad Lahima, Lahima, Abdelkader and Mohamed Amuur v. France*, Judgment of 25 June 1996

apply at transit zones and at borders. Consequently, **all human rights guarantees provided by the Directive proposal and as well as by European and international standards must apply to transit zones.**

Need for a "Two-Step Procedure"

JRS applauds the decision of the LIBE committee to allow Member States the ability to issue a return decision *separately from* a removal order.⁷ This "two-step procedure" is absolutely necessary for migrants to have enough time and capacity to consider voluntary return. **JRS encourages the Portuguese Presidency to support the amendment allowing for a "two-step procedure," which can allow migrants the opportunity to consider voluntary return and therefore reduce the potential number of occurrences of forced return.**

Respect of International Human Rights Standards

When the removal is implemented, migrants should be treated according to international and European human rights instruments ratified by Member States and not only according to national legislations as suggested by the last Council Directive proposal.⁸ **JRS supports the LIBE committee's decision to uphold international and European human rights instruments by obliging Member States to refrain from issuing a return decision whenever a procedure for granting residence or asylum is pending.**⁹

Re-entry Ban

JRS welcomes the decision of the LIBE committee to remove the mandatory application of a "re-entry ban" and to allow Member States greater discretion to decide whether or not to issue such a ban.¹⁰ Most importantly, the changes introduced by the LIBE Committee to the Commission's proposal allow for the withdrawal of the bans due to protection-related circumstances such as when situations in countries have shifted and a person fearing persecution wishes to make a claim for asylum. **However, JRS continues to be deeply concerned that Member States still have the option of imposing a re-entry ban of up to five years.** A five-year ban is still too long, and it continues to have far-reaching consequences for the principle of *non-refoulement* as guaranteed by the 1951 Refugee Convention¹¹. JRS is concerned that the continued ability of Member States to impose a re-entry ban will force migrants to resort to human smugglers, which may then lead to an increase in irregular migration and cause deterioration in relations with third countries. **JRS continues to support the deletion of the re-entry ban from the draft Directive. If included at all, JRS would strongly advocate that the maximum time for a re-entry ban be reduced to one year and for adults only. Particularly for return decisions followed by voluntary return no re-entry ban ought to be attached. In addition, as the re-entry ban is used as a penalty, there must be legal remedies against such an action.**

⁷ Article 6(3) of the Proposal

⁸ Council of the European Union, 19 June 2007

⁹ LIBE committee compromise amendments 29 and 32 of Article 6(5,8)

¹⁰ Article 9 of the Proposal

¹¹ "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Right to Be Properly Informed

During the return process, JRS continues to believe that it is of primary importance that migrants are correctly informed. In this respect, **JRS supports the decision of the LIBE committee to require Member States to provide an oral and written translation of the return/removal acts whether it is requested or not.**¹² Furthermore, the changes by the LIBE committee to the Commission's Proposal allow migrants to receive information about available remedies in a "language the third-country national understands" or is "reasonably presumed to understand."¹³ JRS welcomes these amendments as they align the Directive with protections guaranteed in European human rights standards.¹⁴ **Yet, JRS regrets that the shall continue to only receive a translation of the "main elements of the return decision and/or removal order."**¹⁵ **This leaves too much discretion with the national authorities responsible for the translation to determine which information needs to be translated. All information included within a return and/or removal order must be provided to the third-country national.**

Judicial Remedies

Judicial remedies are also of primary importance. **JRS continues to regret that the draft Directive does not impose upon Member States the obligation to guarantee an automatic suspensive effect of appeals against return and removal orders.** Migrants facing removal may have to "apply for the suspension of the enforcement of the return decision or removal order".¹⁶ In practice, the lack of information and the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. **However, JRS does welcome the LIBE committee's decision to allow migrants to appeal detention and re-entry ban orders, in addition to return and removal orders.**¹⁷ **Moreover, JRS appreciates the LIBE committee's support for an amendment to ensure the provision of legal assistance to migrants.**¹⁸

Detention

The question of detention¹⁹ remains to be a deep matter of concern for JRS. It is known that **detention** can have strong medical and psychological effects on detainees.²⁰ **It should**

¹² LIBE committee compromise amendment 50 of Article 11(2)

¹³ LIBE committee compromise amendment 49 and 50 of Article 11(1,2)

¹⁴ This is in line with Article 5(2) of the European Convention on Human Rights

¹⁵ LIBE committee compromise amendment 50 of Article 11(2)

¹⁶ Article 12 of the Proposal

¹⁷ LIBE committee compromise amendment 51 of Article 12(1)

¹⁸ LIBE committee compromise amendment 52 of Article 12(3). JRS also notes that the appeal must be "effective", too. This was recalled by the European Court on Human Rights' Judgment, *Amuur v. France*. The obligation of effectiveness implies that a number of procedural rights have to be granted to the foreigner. Among those rights are: the right to free linguistic assistance, the right of access to the case file and the right to legal aid

¹⁹ Called "temporary custody" in the draft Proposal, Articles 14 and 15

²⁰ See for example: "From Persecution to Prison: The Health Consequences of Detention of Asylum Seekers" Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003; or "Psychiatric Assessment of Children and Families in Immigration Detention", Sarah Mares & Jon Jureidini, 2004. These two reports are available on: www.idcoalition.org

therefore **remain a measure of last resort that can only be used when it is proved to be necessary, in particular when alternatives measures²¹ are proved to be insufficient.**

JRS strongly rejects the LIBE committee's decision to allow Member States the option to detain a migrant for up to 1-½ years.²² Although this measure does prohibit Member States from detaining a person indefinitely,²³ JRS considers 1-½ years to be excessive. Six months can already be objectively considered as a long period of time for an administrative measure that applies to persons who are not criminals. As stated by the European Court of Human Rights, **any prolongation of detention should be conditioned to a speedy judicial review with an access to free legal and linguistic assistance to be effective.²⁴**

More generally, in respect with Article 5(4) of the European Convention on Human Rights (ECHR)²⁵, **detention should be reviewed by judicial authorities on a regular basis. Every month seems a reasonable basis. JRS rejects the LIBE committee's decision to allow administrative authorities to issue a detention order.²⁶** The pre-eminence should instead be given to judicial authorities, which better represent guarantees of impartiality than administrative authorities. However when a judicial body administers a detention order, it is important that the judicial body in charge of the review is different from the one that has issued the order, so that a fair and transparent decision-making process is ensured.

As regards to the conditions of detention, the **right of the detainees to be informed of the grounds of their detention²⁷**, as well as their **right to health care²⁸** are guaranteed by the ECHR. In addition, **the right to access without delay legal assistance, family members, friends, competent consular authorities, international organisations, NGOs and religious counsellors should be granted to detained migrants.** To that extent, EU Member States should provide legal grounds for the refusal or the withdrawal of permission to receive visits, and make sure that the person concerned is entitled to take proceedings by which the legality of the decision shall be decided by a court. Moreover, conditions of detention should, at least, never be worse than those of ordinary criminals. Thus, **freedom of communication, use of telephone and leisure activities must be provided.**

JRS' deepest worry concerns the possibility left to Member States to detain minors. **According to international human rights instruments²⁹, the detention of minors should**

²¹ Monitoring requirements; provision of guarantor/surety; release on bail and open centres

²² LIBE committee compromise amendment 60 of Article 14(4 b)

²³ For example, Germany can detain irregular migrants for periods up to eighteen months. In UK, there is no time limit for detention.

²⁴ ECtHR, *Amuur v. France*, Judgment of 25 June 1996

²⁵ "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"

²⁶ Article 14 of the Proposal

²⁷ See in particular Article 5(2) of the European Convention on Human Rights (ECHR): "Everyone who is arrested shall be informed promptly, in a language which he understands of the reasons of his arrest and the charge against him".

²⁸ See in particular Article 3 of the ECHR, which prohibits "torture" and "inhuman and degrading treatment or punishment". In the *Cyprus v. Turkey* Case (Commission Report of 10th July 1976), the European Commission for Human Rights ruled that not providing medical assistance in detention centres constitutes inhuman treatment contrary to Article 3 of the ECHR.

²⁹ See Article 5(1) d of the ECHR, which only allows "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent

remain a measure of last resort. Additionally, **minors should have access to education and this access should not be subjected to the length of their stay** on the territory of a Member State. **However, JRS does welcome the LIBE committee's decision to prohibit the removal or detention of unaccompanied minors,**³⁰ and also the decision to strengthen protections for migrants with children.³¹

JRS has advocated for the setting up of a EU body, which monitors and periodically reports on the development of national legislation and practices regarding detention in the Member States. To that extent, **JRS welcomes the idea raised by the European Parliament, and approved by the LIBE committee, to create a “European Parliament Ombudsman on Return”**³² and **advocates for providing this new body with the right to conduct unannounced inspections in premises detaining migrants to be removed.**

Migrants Who Cannot Be Removed

Finally, **JRS continues to be very much worried about the fate of migrants who cannot be removed for technical reasons** (for example, because their countries of origin refuse to deliver the needed documents). In many Member States, these people are detained for extended periods of time. If released, they often live in destitution without enjoying the basic rights that would allow them to enjoy a proper standard of living. **JRS therefore supports the LIBE committee's decision to allow Member States to grant these persons with autonomous residence permits,**³³ which would allow them to live properly without being a burden for the host society. **JRS continues to advocate for temporary residence permits that could be granted for a period of two or three years, renewable for one time. If, at the end, the conditions to remove these persons are not met yet, they should be eligible to receive a long-term residence permit as defined by the EU legislation.**³⁴

authority.” See also the international Convention on the Rights of the Child: Article 3 which provides that in any action taken by States parties concerning children, the best interest of the child shall be a primary consideration; Article 37 by which State Parties are required to ensure that detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.

³⁰ LIBE committee compromise amendment 23 of Article 5(c)

³¹ LIBE committee compromise amendment 23 of Article 5(b) and amendment 67 of Article 15(a)

³² LIBE committee compromise amendment 68 of Chapter V(a)

³³ LIBE committee compromise amendment 28 of Article 6(4)

³⁴ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents