

To European Parliament LIBE Committee - Rapporteur Fabienne Keller

Date 6 December 2023

Subject Meijers Committee letter on the Migration and Asylum Pact – Asylum Procedures Regulation

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

Dear Rapporteur, Fabienne Keller,

The New Pact on Migration and Asylum was first launched by the European Commission in September 2020. In our [earlier comment of November 2020](#), the Meijers Committee presented detailed legal comments on the legislative proposals of the Pact in separate documents and identified shortcomings of current laws and policies. On 8 June 2023, the Council took a decisive step towards a modification of the EU's legal framework for asylum and migration. It agreed on a negotiating position on the Asylum Procedure Regulation.¹ This position will form the basis of negotiations by the Council with the European Parliament and the European Commission. On 4 October 2023, the Council made another significant step towards the goal of reaching an agreement on the entire Pact by the end of this semester.

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The Meijers Committee welcomes that the reform of the Common European Asylum System (hereafter: CEAS), after years of divisive negotiations, has entered its final stage. At the same time, the current proposal and negotiations regarding the Asylum Procedures Regulation (hereafter: Amended Proposal APR) still raise concerns with regard to the protection of asylum seekers in the European Union. In this letter we specifically stress two points within the Amended Proposal APR that in the view of the Meijers Committee need to be addressed in the upcoming trilogue on 7 December 2023: 1) the use of mandatory instead of voluntary border procedures; and 2) the detention of minors. Our Committee hereby refers to our earlier comments written on these issues and emphasises the following points.²

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Mandatory use of border procedures

The current Amended Proposal APR introduces mandatory border procedures for certain groups of applicants, with the purpose of quickly assessing at the EU's external borders whether applications are unfounded or inadmissible. As long as asylum seekers are subject to the border procedure, they are assumed not to have entered the territory and Member States must 'require them to reside' near the border. This will de facto lead to increased detention of applicants for international protection (*see the point on detention in the paragraph below*). In an [earlier comment dating from 2020](#), the Meijers Committee has already raised concerns with regard to the mandatory use of border procedures in the Amended Proposal APR, specifically because of the low procedural safeguards, including short time limits of the procedure, and the risk of applicants having insufficient time to

¹ See Council General Approach of 8 June 2023: <https://data.consilium.europa.eu/doc/document/ST-10444-2023-INIT/en/pdf>; see also Amended Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM (2020) 611 final.

² Meijers Committee Comment on the Migration Pact – Asylum Procedures Regulation, 1 November 2020, available at https://www.commissie-meijers.nl/wp-content/uploads/2021/09/cm2014_asylum_procedures_regulation.pdf, see also: General Comments of the Meijers Committee on the new pact on asylum, available at https://www.commissie-meijers.nl/wp-content/uploads/2021/09/cm2009_asylum_and_migration_pact_general_comments.pdf.

substantiate their application, as well as the determination authorities becoming overburdened, resulting in a lack of access to a fair and effective examination.³ In this context, the Meijers Committee recommended that the EU legislator removes the mandatory use of the asylum border procedures as proposed in Article 41(3) Amended Proposal APR.⁴ For a more detailed discussion of the proposed mandatory use of border procedures, we refer to our comment of 2020.

Detention of minors

According to the proposed Article 41(6) Amended Proposal APR, applicants subject to the asylum border procedure are not authorised to enter the Member State's territory. Member States shall 'require applicants to reside' at or near the border. While the proposal does not prescribe closed asylum centres, these border procedures would have to rely on restrictions of movement of asylum seekers at border or transit zones, which may in some – and maybe most – cases amount to de facto detention, in which case they would regularly be unlawful for failing to be in line with material and procedural standards. It is well-established that the distinction between deprivation of liberty amounting to detention and restrictions on movement is one of degree rather than substance.⁵ Moreover, restrictions on the liberty of movement, even if they do not amount to detention, must be in accordance with Article 8 of the European Convention of Human Rights (hereafter: ECHR) for irregular migrants, and with Article 2 Protocol 4 ECHR for those lawfully staying, and thus also need to be justified on a case-by-case basis.⁶

In addition, according to the proposal, Member States may de jure detain applicants during the border procedure in accordance with the provisions of the Reception Conditions Directive (i.e. Recital 40(f), Article 41(9)(d) Amended Proposal APR; current Art. 8(3)(c) Directive 2013/33/EU). In effect, the current Amended Proposal APR expands the situations in which Member States may detain applicants for international protection, in violation of the well-established general principle that detention of asylum seekers can only be used as a measure of last resort. To this end, recourse to detention must be necessary and proportionate and should be based on a reasoned decision containing an individual assessment – also in the context of a border procedure.

Moreover, the EU Charter of Fundamental Rights (hereafter: CFR), which forms part of EU primary law, guarantees in Article 6 CFR that “everyone has the right to liberty and security of person.” The application of secondary EU law such as the proposed APR should be in accordance with the letter and spirit of the CFR. In this context, the Court of Justice of the EU (hereafter: CJEU) has made clear that detention “constitutes a coercive measure that deprives the applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter.”⁷ Moreover, the European Court of Human Rights (hereafter: ECtHR) has reiterated that detention is such a serious measure that unless justified as a last resort where alternative and less severe measures have been considered and deemed insufficient

³ Meijers Committee Comment on Asylum Procedures Regulation, supra note 2, p. 2.

⁴ Meijers Committee Comment on Asylum Procedures Regulation, supra note 2, p. 4.

⁵ See ECtHR, *Khlaifia and others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, at para. 64.

⁶ See ECtHR, *Battista v. Italy*, Appl. no. 43978/09, Judgment of 2 December 2014, at para. 51–52, where the applicant complained against compulsory residence order under both Art. 2(1) Protocol No. 4 ECHR and Art. 8 ECHR. The Court held that the claim raised under Art. 8 ECHR was ‘closely linked to the complaint under Article 2 of Protocol No. 4’ and therefore needed not be assessed separately. See further, ECtHR, *Oliveira v. the Netherlands*, Appl. no. 33129/96, Judgment of 4 June 2002, at para. 67–69; *Garib v. the Netherlands*, Appl. no. 43494/09, Grand Chamber Judgment of 6 November 2017, at para. 140–141; see also, more extensively, in the preceding Chamber judgment of 23 February 2016: ECtHR, *Garib v. the Netherlands*, Appl. no. 43494/09, at para. 114–117.

⁷ CJEU, Judgment of 30 June 2022, *M.A. v. Valstybės sienos apsaugos tarnyba*, C-72/22 PPU, ECLI:EU:C:2022:505, par. 39.

to safeguard an individual or public interest, it may be found to be arbitrary.⁸ This is particularly the case if minors are involved.⁹ However, by way of making the asylum border procedure mandatory for certain groups of people for the purposes of assessing their claims – especially those coming from countries of origin with a yearly Union-wide recognition rate of 20% or lower, combined with the broad ground for detention for the purposes of conducting a border procedure as laid down in Article 8(3)(c) of the Reception Conditions Directive – the Amended Proposal APR would permit for their detention without particular reasons specific to the individual. To this end, the Meijers Committee calls upon the EU legislator to ensure that, if the border procedure is applied, detention is based on an individual assessment taking account of its necessity and proportionality.

The Meijers Committee is especially concerned with the position of children in this respect: the proposed border procedures will also apply to children aged 12-18 travelling with their parents, meaning that minors could also be detained. Moreover, according to the position of the Council, both unaccompanied and accompanied children can be subjected to detention when they are considered to be a danger to the national security or public order of the Member State. The UN Convention on the Rights of the Child (hereafter: CRC) defines a child as every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. No distinction can thus be made between children above and below the age of 12 when it comes to the safeguards provided to them as minors. The UN Special Rapporteur on the Human Rights of Migrants has argued that children should never be detained for immigration purposes, nor can detention ever be justified as being in a child's best interests,¹⁰ a view that is shared by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child.¹¹ The ECtHR has also regularly found detention of children to be disproportionate in relevant cases that came before it.¹² In sum, the requirements of necessity and proportionality renders immigration detention of children almost always unlawful.

Detention of children who are subjected to the border procedure might also lead to a violation of Article 4 CFR and Article 3 ECHR. Even if a child is accompanied by a parent this does not relieve national authorities of the obligation to protect children from treatment in breach of Article 3 ECHR and Article 4 CFR.¹³ The Meijers Committee stresses that all children should be exempted from the border procedure and of being held in detention for the sole reason of applying for asylum, in conformity with Article 3 CRC, Article 6 CFR and Article 5 ECHR.

Conclusion

In light of the foregoing, the Meijers Committee is concerned about the reduced level of protection in the Amended Proposal APR as more applicants will be subject to border procedures and detention in comparison to the current Asylum Procedure Directive,

⁸ ECtHR *Rusu v. Austria*, App No. 34082/02, (2 October 2008), para 58.

⁹ ECtHR *A.D. v. Malta*, ECtHR App No. 12427/22 (17 October 2023).

¹⁰ Report of the Special Rapporteur on the human rights of migrants: Focus Return (2018), at 10.

¹¹ See joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22; joint General Comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23.

¹² See ECtHR *A.D. v. Malta*, ECtHR App No. 12427/22 (17 October 2023).

¹³ ECtHR *A.M. and others v. France*, no. 7534/20, 4 May 2023, para 8.

including children. The lower procedural safeguards in border procedures will likely lead to lack of access to a fair and effective examination.

We hope that the European Parliament and the Council will take our previous comments on board during the upcoming trilogues on the asylum pact. As always, we remain at your disposal for further information and to answer your questions.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'A.B. Terlouw'.

Prof. dr. A.B. Terlouw, Chairwoman