



Apprehension of migrants in an irregular situation – fundamental rights considerations

Acknowledging:

- a) that it is the prerogative of Member States to determine, with certain exceptions, whether a third-country national can stay or not on their territories and that Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) contains in Article 6(1) a duty to issue a return decision to illegally staying third-country nationals;
- b) that in the implementation of the Return Directive, Recital 22 and Article 5 emphasise, amongst others, the respect for the best interests of the child, family life, and the state of the health of the third-country national concerned;
- c) that other legitimate interests, such as fundamental rights, public health concerns, fighting crime, legal certainty, promotion of voluntary return as well as social policy considerations should also be taken into account when enforcing immigration law;
- d) that a number of fundamental rights, such as the right to health, the right to education, freedom of religion, the right to birth registration or the right to an effective remedy are directly relevant to all persons present in the territory of the Member States;
- e) that the European Union Agency for Fundamental Rights documented that detections at or next to public institutions such as schools, hospitals or courts, as well as reporting or exchange of personal data between these institutions and immigration law enforcement bodies may create a general atmosphere of fear among migrants in an irregular situation, deterring them from accessing such institutions and thus disproportionately interfering with their fundamental rights;
- f) that in practice such immigration law enforcement actions are not frequent and that return policy objectives can be met effectively, without having to resort to apprehension measures which may disproportionately affect fundamental rights;
- g) that, except where criminal enforcement interests to apprehend a particular individual outweighs the negative impact on the fundamental rights of other migrants in an irregular situation, the recommendations contained in the common principles below should be respected;
- h) that the common principles below concern solely enforcement of immigration law for the purposes of return and that they do not address apprehension for other reasons, such as enforcement of criminal law, nor do they concern issues related to costs coverage of medical expenses incurred by migrants in an irregular situation, admission to education establishments or the right to stay;



- i) that entities providing humanitarian or legal assistance can help to find pathways out of irregularity and can play an important role in disseminating relevant information in this regard and that the common principles below should go hand in hand with efforts to disseminate information materials – including, where appropriate, via the service providers and public institutions mentioned below – on possibilities for voluntary return, the consequences of irregular stay, such as forced removal accompanied by an entry ban, as well as on possibilities for regularising their stay,

the following common principles have been developed to guide immigration law enforcement bodies on apprehension practices and shall be applied as a general rule:

General principle:

1. Immigration law enforcement agencies should make full use of fundamental rights training offered by entities providing humanitarian or legal assistance and other actors, including specialised training for the identification of particularly vulnerable persons, such as unaccompanied children and victims of trafficking.

Access to health:

2. Migrants in an irregular situation seeking medical assistance should not be apprehended at or next to medical facilities.
3. Medical establishments should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.

Access to education:

4. Migrants in an irregular situation should not be apprehended at or next to the school which their children are attending.
5. Schools should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.

Freedom of religion:

6. Migrants in an irregular situation should not be apprehended at or next to recognised religious establishments when practicing their religion.

Birth registration:

7. Migrants in an irregular situation should be able to register the birth and should be able to obtain a birth certificate for their children without risk of apprehension.
8. Civil registries issuing birth certificates should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.



Access to justice:

9. In the interest of fighting crime, Member States may consider introducing possibilities for victims and witnesses to report crime without fear of being apprehended. To this end, the following good practices may be considered:

- introducing possibilities for anonymous, or semi-anonymous, or other effective reporting facilities;
- offering victims and witnesses of serious crimes the possibility to turn to the police via third parties (such as a migrants ombudsman, specially designated officials; or entities providing humanitarian and legal assistance);
- defining conditions under which victims or witnesses of crime, including domestic violence, could be granted residence permits building upon standards included in Directive 2004/81/EC and Directive 2009/52/EC¹;
- considering the need for delinking the immigration status of victims of violence from the main permit holder, who is at the same time the perpetrator;
- developing leaflets in cooperation with labour inspectorates or other relevant entities to systematically and objectively inform migrants apprehended at their work places of existing possibilities to lodge complaints against their employers, building upon Directive 2009/52/EC, and in this context taking steps to safeguard relevant evidence.

10. Migrants in an irregular situation who seek legal aid should not be apprehended at or next to trade unions, or other entities offering such support.

¹ Directive 2004/81 of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities and Directive 2009/52 of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.