



Dimitris AVRAMOPOULOS

Member of the European Commission

Rue de la Loi, 200
B-1049 Brussels - Berl.
Tel. +32

Brussels, 02. 07. 2018

I have received your letter of 8 May 2018 in which you expressed concerns with regard to the fact that third-country nationals decide not to apply for international protection and subsequently contest the return decisions issued to them, arguing that their return to their country of origin would lead to a violation of Article 4 of the Charter of Fundamental Rights or Article 3 of the European Convention of Human Rights.

While we fully understand the challenges that this situation creates for Belgium, the Commission finds it difficult to share the interpretation that the claims by third country nationals of a risk of violation of *non-refoulement* in the context you describe can be considered as the "making" of an application for international protection within the meaning of Directive 2013/32/EU. However there is no case-law on this specific matter and only the Court of Justice of the European Union can provide a final and binding interpretation of the EU acquis.

That being said, the situation at stake requires, in my view, pragmatic solutions. The Belgian authorities should clearly inform these persons that they do not have the right to choose in which Member State they apply for asylum and that whether they apply or not in Belgium will not necessarily have an impact on the Member State that will examine the application.

If they apply subsequently in the United Kingdom or in another Member State, they should be made aware that they can still be sent back to Belgium pursuant to the Dublin rules if they have stayed irregularly in Belgium for at least five months.

Moreover, even if the person does not apply for asylum in Belgium, the Belgium authorities can verify the data of illegally staying third country nationals in Eurodac to check whether the person has applied for asylum in another Member State given that the person has claimed that they would be in danger if they are being returned to his or her country of origin.

Mr. Theo FRANCKEN
State Secretary for Asylum and Migration
BELGIUM

If the person already applied for asylum in another Member State, this person, even if he/she did not apply for asylum in Belgium, could be sent back to the Member State responsible. However, if the person did not apply for asylum in another Member State, no information will be obtained as data of illegally staying persons is only comparable against data of asylum applicants, under the current legislation.

Where no asylum application was made in any Member State, Dublin rules cannot be triggered. However, the person could be sent back to another Member State, according to Article 6(3) of the Return Directive, on the basis of a valid bilateral readmission agreement or arrangement existing on the date of entry into force of the Directive.

In any case, these persons should also be informed of the fact that, by not applying for asylum in Belgium, they will not benefit from the more extensive rights enjoyed by applicants for international protection. Indeed, third-country nationals who refuse to apply for international protection are, as stated in your letter, to be considered as illegally staying in the Member State and be subject to the provisions of Directive 2008/115/EC ("Return Directive").

In such a case, the Member State concerned has to adopt a return decision. If the third country national lodges an appeal against a return decision because he considers that there is risk of *refoulement* in case of return, it is for the national judge to assess whether there is such a risk in the individual case. If there are reasons to believe that the enforcement of such a decision would infringe the principle of *non-refoulement*, its enforcement should be suspended.

In case of suspension, EU law does not require that Member States should provide other specific procedures than those established by the Return Directive. The Return Directive only specifies that the illegally staying third-country nationals should receive basic assistance according to your national legislation and that person should be provided with a written confirmation of their situation.

I hope that these elements will prove useful to you to handle these cases.

