

Warsaw, 24.08.2018

## Fundamental Rights Officer's Observations to return operations conducted in the 1<sup>st</sup> Semester of 2018

1 January - 30 June 2018

### Background and overview of activities

In accordance with Article 28 (8) of the European Border and Coast Guard Regulation (hereafter referred to as 'the Regulation'), the Fundamental Rights Officer (FRO) shall provide observations on fundamental rights covering all return operations. Her observations are attached to the Executive Director's semi-annual evaluation report to the Management Board. The reporting period is therefore adapted to the submission of the evaluation report by the Executive Director, covering the first semester of 2018. FRO Observations from the previous semester (July-December 2017) were shared with the Member States' Direct Contact Points on Returns, Member States' return monitoring bodies and monitors from the pool of forced return monitors (hereinafter referred to as 'the pool').

The **pool**, as foreseen in Article 29 of the Regulation, became fully operational on 7 January 2017. As set forth by Article 28 (3) of the Regulation, at least one forced-return monitor from the pool or from the national monitoring system of the participating Member State, shall be present throughout the entire return operation from the pre-departure phase until the hand-over of the returnees in the third country (TC) of return, with the aim of ensuring that the fundamental rights safeguards are in place. The mechanism acts *de facto* as a **subsidiary guarantee** to the Member States' (hereinafter referred to as 'MSs') obligation to provide an effective forced-return monitoring system, as per Article 8(6) of the Return Directive 2008/115/EC. Prior to the enactment of the Regulation, the Agency and the FRO have constantly encouraged MSs to enhance the systematic use of their national monitoring bodies in all return operations. The strengthening of national monitoring mechanisms would have a positive direct impact on the overall capacity to monitor return operations, both at national and European level.

As foreseen in Article 36 (4) of the Regulation, the forced-return monitors shall be provided with a specific training covering all the aspects regarding fundamental rights, especially concerning the use of force and means of restraints, and access to international protection. In the period from 1 January to 30 June 2018, FRO team was actively engaged in the following activities supporting return matters:

- On 30 January 2018, the FRO attended the High Level Round Table on Return Operations by the European Border and Coast Guard Agency;
- From 8-9 February 2018, FRO was engaged in the workshop on the set up of the Swedish national monitoring system in Stockholm, which intended to build up and strengthen the forced return monitoring system in Member States.
- FRO received invitation for the Combined 47th DCP meeting and 6th PRAN meeting, 20-21 February 2018 in Sofia, Bulgaria. Due to other obligations (Consultative Forum

meeting) and the lack of available staff required for such a discussion, FRO had to postpone participation.

- From 27 to 28 February, FRO took part in the Forced-Return Monitoring II (FReM II) - Workshop on Good Practices: Fundamental Rights Compliance in Forced-Return Operations in Riga.
- From 3 to 10 March, FRO actively supported as an expert the Forced-Return Monitoring II (FReM II) 3rd Training course for Forced-Return Monitors, hosted in Prague by the Office of the Public Defender of Rights and the Czech Police.
- FRO contributed to the Instrument for Pre-Accession Assistance (IPA II) First Regional Training for the forced return monitors from Western Balkans on 11-12 April in Belgrade.
- On 23 May in Sopot, Poland, FRO supported a request from ECRET to exchange on the complaints mechanism in return and a presentation of the draft main findings of Observations to the 2nd semester 2017 for the DCP session.
- On 11-12 June, FRO and the Operational Officer from the European Centre were invited to Athens as experts and members of the facilitation team to attend the Training for monitors-Fundamental Rights in Return and Readmission operations.
- On 19 June, FRO team participated as observers to the 2nd High Level Round Table on Return organized at Frontex premises.
- Also, on 19-20 June, FRO participated in Forced-Return Monitoring II (FReM II)- 2nd Annual Lessons Learned Meeting hosted by the Office of the Finnish Non-Discrimination Ombudsman in Helsinki, Finland.

#### Observations of the Fundamental Rights Officer

FRO provides in these Observations an overview of the **findings and conclusions** from the **74 reports submitted by the forced-return monitors** activated from the pool and **2 reports from national monitors**. FRO also highlights examples of **good practices** for the consideration of both the Management Board and the Executive Director as well as recommendations to act upon in order to ensure fundamental rights compliance during the Agency's return activities.

According to the information provided in the Frontex Evaluation Report on Return Operations in the 1<sup>st</sup> Semester of 2018, 113 return operations co-ordinated by Frontex, out of a total of 165, were physically monitored. FRO has received monitoring reports from 75 operations, including one from a JRO on a partial pre-departure phase. Notably, during the reporting period, all of the Agency's supported Collecting Joint Return Operations had on-board a forced-return monitor from the pool or from a national monitoring system of the participating MSs through the entire return operation, as foreseen in Article 28 (3) of the Regulation.

In general terms, FRO notes that there are no Serious Incident Reports submitted by participants in the operations. However, there have been a number of **incidents reported by the monitors**, which triggered follow up and are underlined in this report. FRO wishes to express concern over the different understanding of incidents among the participants and encourages the authorities of the MS as well as the Agency's Training Unit (TRU) to use the Observations of the FRO for training purposes of escorts and escort leaders so that all participants in the operation share a common understanding of when an incident can negatively impact fundamental rights.

#### 1. Preparation of return operations

As provided in Article 4 of the *Code of Conduct for Return Operations* (ROs) and Return Interventions (RIs) (hereinafter "the CoC") *coordinated or organised by Frontex*, the Agency shall ensure that ROs and RIs are to be conducted in a humane manner and in compliance with fundamental rights. In order to achieve this goal, there is a need to provide sufficient and adequate safeguards already in the preparation phase of the RO and/or RI. The comments by the forced-return monitors related to the preparation of the operation that should be taken into consideration are the following:

- As provided in the Guide for Joint Return Operations by Air co-ordinated by Frontex, the gender and age of the returnees, as well as the experience and the language skills of the forced-return escorts should be taken into account when assigning them to the return operation. In accordance with monitoring reports received, there is a recurrent need to

increase the number of female forced-return escorts, to ensure adequate escorting in operations when women and families with children are to be returned. In a monitoring report, a male escort accompanied a woman to the entrance of the toilette while female escorts were certainly available. The presence of a female officer in this situation is a basic standard. In other reported cases, female escorts were not allocated to accompany children and female returnees or were not enough in numbers by comparison to the amount of pregnant women and children. FRO agrees with the monitors that the presence of female officers should be ensured throughout all phases of the implementation of an operation involving women and children as to ensure the effective protection of the Charter of Fundamental Rights of the EU, especially the rights to privacy, integrity and human dignity and to ensure that potential gender specific needs are identified and addressed.

- Prior to the start of the operation, forced-return monitors should be informed about the number, origin and vulnerabilities and/ or special considerations of returnees, as provided in Article 16 of the *Code of Conduct for Joint Return Operations co-ordinated by Frontex (CoC on JRO)*. In accordance with a monitoring report, in one case a printed copy of the implementation plan was not given or available to the monitors before the operation. In another case, due to a lack of information provided in advance, the monitor could not take part in the flight.
- Monitors note as an important aspect of their work, the need to observe the physical security checks and what happens with the personal belongings of the returnees. FRO considers that a Standard Operating Procedure for discussion among all stakeholders and standardization of the engagement of the monitors would be beneficial for the adequate management of the pool.
- In accordance to a monitoring report, the briefing did not clarify key aspects of the operation: the allocation of returnees to escorts; seating plan so that the monitor could anticipate his/her position in the plane; and risk assessment/outcome of risk assessment. FRO recommends to provide the monitor with an estimated time and location for the briefing as soon as contact is established. This would allow the monitor to choose suitable flights or other transport so as to arrive on time for the briefing and the rest of the pre-departure phase.
- In accordance with monitoring reports received, it was noticed the lack of a room that meets privacy standards in order to interview some returnees. With the aim to ensure the privacy of the persons to be returned, OMS and PMS should further improve the conditions of dedicated areas of embarkation prior to departure. Similarly, temperature conditions in the plane should be adequate as it increases discomfort among the returnees- and also participants.
- As reported, in one operation, a representative of the Ministry of Interior was waiting for escorts and returnees together with a cameraman, filming escorts and returnees disembark from the plane and entering the bus for the ride to the border control. There was no information in advance about recording the final phase of this return operation on video. Under Article 10 of the CoC, photographing, filming or any other form of graphic production during a JRO is possible only when specifically agreed with the Organising Member State (OMS). Then, the information regarding media coverage of the ROs at the destination country shall be requested and agreed in advance to the MS participants and returnees, which was apparently not the case in one operation organised in the 1<sup>st</sup> semester of 2018. Escorts and returnees should be informed in advance about planned media coverage even in all cases. FRO notes that this situation may be clearly be viewed as an interference with the right to privacy of the returnees -and participants - and the rights of the child in case those are involved, and should be avoided, and discussed with the TC authorities in preparation of flights.
- A monitor suggested the involvement of the forced-return escort trainers in the Collecting Return Operation organised for the first time, as a good practice that could revert into a discussion with the TC escorts about their doubts and questions.
- Pursuant to some monitoring reports, no physical security checks were observed before embarkation or were performed in a very lightly way. Having into consideration that security checks might have been previously performed in detention centres, FRO recommends to maintain a balance and to guarantee safety standards to avoid potential self-harm or harm of others during the return operations.

- In a monitoring report, pocket money was apparently promised but not paid to two families with small children in order to reach their homes after landing in the airport of their TC, which created tensions during the hand over procedure.

## 2. Communication and right to information

With regards to Article 14 of the CoC, the competent authorities of the MSs as well as the other participants shall seek cooperation with each person being returned, at all stages of the return operation. Following the observations received, there are still some issues that should be taken into consideration to improve communication between returnees and participants of return operation, as highlighted by the forced-return monitors. Namely:

- In accordance with some monitoring reports, in some operations no interpreters were present during the flight or the hand-over in the TC - handling of luggage and personal belongings- when needed. FRO recommends the increasing involvement of interpreters throughout all phases of forced-return operations to be carried out, which results clearly in the returnees' better understanding about procedures as well as lower anxiousness and possible aggressive reactions of the persons during the operations. FRO further suggests ECRET to take steps to gradually report about the exact number of interpreters in return operations in their bi-annual Evaluation Report and encourage their presence as a means to enhance cooperation and communication during return operations, depending on the language requirement, when needed.
- Some notes were made on the wrong and negative behaviour of some interpreters towards returnees and other participants. FRO suggests to consider training of interpreters taking part in ROs on the Agency's Code of Conduct and expectations about their behaviour.
- During the reporting period, a family transferred directly from a refugee camp was shocked by their removal as they apparently have never received the expulsion letter nor their names were posted on a list of persons to be expelled in the refugee camp. The competent authorities of the MSs are expected to give sufficient and clear information to all returnees about the operation. As underlined by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>2</sup>, it is essential for immigration detainees to be informed sufficiently in advance of their prospective removal, 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 belongings. FRO considers that this information serves to reduce tensions in the flight.
- In order to facilitate communication, a monitor recommended to consider to place a simple diagram at the airport informing in different languages about the steps of the procedure in the airport terminal.
- Challenges with the handling and use of mobile phone persist, which is especially important for cases where people have not had a chance to notify their relatives/friends of their imminent return. In light of diverse practices in MSs, it is advisable to include in the procedures prior to the departure a moment when returnees could either use their mobile phones to make a phone call to their relatives in the TC, or in absence of their own mobile, a systematic solution is found to allow a phone call to be made (duty mobile phone or alike).
- In accordance to a monitoring report, knowledge of prior information given to returnees (including right to complain about conditions in the removal operation) at detention centres remained vague, if it exists at all. Reportedly, returnees did not understand that a prohibition to enter an OMS for a certain period would act as a prohibition to enter any Schengen country. In other cases, it was observed a lack of information to returnees on the availability of Frontex complaints mechanism or no official complaint forms were available throughout the return operation or at least the monitor did not see them.

## 3. Medical issues

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<sup>2</sup> CPT/Inf(2003)35-part



The presence of medical staff (doctor, nurse or medic) has been ensure in all coordinated operations. It remains as one of the key aspect of guarantee for fundamental rights in the work of all participants in return.

- The medical team performed promptly in the situation, where a returnee fainted due to stress. Immediate response let the returnee recover in a short time.
- Another good practice highlighted is to place the medicines prescribed to returnees in individual labelled envelopes, as it facilitates the hand-over of medicines upon arrival in a third country (TC) of destination.
- In accordance with a monitoring report, in one case the fit-to-fly document was missing and as a result of which the returnee was not admitted to the flight. In another case, the OMS doctors did not issue fit-to-fly certificates for the returnees. As already raised in the *Fundamental Officer's Observations to return operations conducted in the 1<sup>st</sup> semester and 2<sup>nd</sup> semester of 2017*, national authorities set up the rules on issuance of fit-to-fly certificate, ideally as a mandatory requirement, in line with the CPT standards.
- As reported, TC authorities refused a returnee's entry into the country claiming that he was mentally sick, and stating that the acceptance of sick returnees was excluded in the relevant readmission agreement. Surprisingly, there was neither cognisance of such sickness in the MS of return nor the information of any medicines prescribed.
- In accordance with a monitoring report, in one case a doctor or a medical technician had no medicine case on board (in that particular flight there were 2 people with serious illness: diabetes). FRO recommends that a case with medicines is always available to the doctor in return flights.
- In accordance with a monitoring report, in one return operation medical interventions were not always done with the returnee's consent.
- As noticed, in one flight unnecessary information was announced about the medical situation of some returnees containing some sensitive information that could, in the monitor's opinion, potentially put into risk returnees in their countries of origin.

#### **4. Right to privacy and property of persons returned**

In the 1<sup>st</sup> semester of 2018, forced-return monitors reported about the incidents that allegedly might result in a violation of the right to property of the persons pending removal, as follows:

- As noticed, the returnees' personal belongings - e.g. mobile phones or chargers - should not be treated as hold luggage but stored in a sealed envelope or in a transparent sealed plastic bag, marked with the name of the returnee, and kept by the respective escort. In one case, personal belongings taken at time of the security check were not returned to returnees before handover to the TC officers.
- Personal medicines were placed in the hold luggage and not in the cabin, stored in a sealed envelope or in a plastic bag, marked with the name of the returnee, and kept by the doctor.
- In accordance with some monitoring reports, escorts did not ensure that correct hold luggage was handed over to the actual owner. In most of the cases it was done out of sight of the monitor as monitors could not leave the plane. One potentially recommended practice was observed in an operation where photo documentation was made of returnees upon arrival with their possessions/luggage to ensure which returnee had arrived with a particular luggage so there could be no misunderstanding about missing luggage upon arrival. FRO would recommend to strengthen luggage handling procedures in the upcoming revision of the Guide on JROs currently ongoing within the Agency.
- In accordance with a monitoring report, some returnees were not permitted to pack and to take their personal belongings along the removal and they carried only what they had with them when they were detained.

#### **5. Treatment of vulnerable groups**

In the preparation and throughout the implementation of operations, special consideration should be given to vulnerable persons such as children, disabled persons, elderly people and pregnant women. Some observations provided by the forced-returned monitors include:

- In general, adequate special care was provided for families with children. Diapers and baby food were accessible prior to embarkation, which is a good practice to be followed. Additionally, families with small children were provided with adequate food during flight.
- Adequate accessibility measures was also provided for a disabled woman in a wheelchair, and special walkers for elderly persons to be returned.
- As noted in one case, no wheelchairs were available at the airport, although officials reportedly were informed in advance about such a need.
- It is an essential matter to tailor the waiting area at the airport to the specific needs of vulnerable persons in the flight. A forced-return monitor observed that the waiting area was too small, with no designated room for returnees that would become violent. Therefore, a violent returnee was placed in the room initially designated for children and for that reason families with small children had to wait altogether with adult returnees.
- Monitors note as a good practice to allow that children keep their bottles, diapers and small toys, which facilitates the implementation of operation. In one case the toys were already been gathered by a social worker and at the disposal of the organisers of the operation (in the waiting hall of the terminal and during flight). Generally, it was observed a continuing lack of distribution of toys to kids, and rarely the permission to carry their own favourite toy.
- In accordance with a monitoring report, an 8 months pregnant woman was declared fit to travel. FRO proposes to include this issue in the discussion with JRO doctors to take place in the 2nd half of 2018 and potentially reach a procedure and a medically solid standard for forced-return flights to avoid any risk to the mother and the baby.
- In some operations there was no clear separation of vulnerable persons from other potentially violent individuals. Monitors reports as a good practice, that pregnant women and families with children shall board the aircraft separately and shall be seated separately from other returnees.

## **6. Use of force and means of restraint**

Article 6 of the CoC reflects the international and European standards on the use of force and means of restraint, which can be applied only in accordance to necessity, legality and proportionality principles, or in response to an immediate and serious risk. Any decision to use coercive measures has to be based on an individual risk assessment. The use of force require the application of specific techniques employed by trained staff, who is also submitted to periodical refresher training sessions, otherwise, although the mission of carrying out a forced repatriation is accomplished, potential risks to the physical safety and dignity of returnees might be tackled.

- As noticed in some reports, the list of authorised / forbidden restraints was not provided to the monitor.
- As noted by a monitoring report, in one case a 17 years old returnee was transferred to the airport handcuffed on the back with no further explanation, but only a generic an 'assessment of authorities for a risk of potential violence". FRO recommends not to use restraints as a precaution measure, and especially when they are on children, as the collision with the best interests of the child on this case needs to be clearly based on a solid individual risk assessment.
- In one flight, a returnee appeared and was restrained with handcuffs in the back for considerable amount of time. Consideration of handcuffs in the front or other less potentially uncomfortable restraint measures should be considered, in line with the standards provided during the escort training, especially when the returnee seemed calmed.
- During some CROs, there were no presence of the TC monitors. FRO continues to encourage the presence of TC monitors together with the MS or forced return monitor from the pool, as an additional safeguard to ensure the follow up of possible incidents

with the TC authorities. Accountability is a matter of concern in this hypothetical challenging situations.

#### **7. Identification of participants during return operations**

In line with Article 12 of the CoC on JRO, all participants to the operations must be identifiable.

- In accordance with a monitoring report, the doctor did not wear a distinctive vest. The monitor noted that medical personnel and interpreters should always be perfectly identifiable by returnees.
- In some operations, monitors reported that officers appeared with their head covered with a balaclava, due to prior threat to officers in the territory of the MS. In order to ensure a fundamental rights compliant balance of legitimate security concerns, FRO suggest to ensure that identifiability of officers is always ensured, if required by a number in the vest, to ensure compliance with CPT standards and the CoC on JROs.
- In another case, there was no also Frontex ID nor vest available for a monitor. The matter has been acknowledge and will be resolved with the delivery of vest for all participants in the 2nd half of 2018.

#### **8. Basic needs**

- As previously reported, it is once again recommended to further improve the quality of the food served during the in-flight phase of the operation. As observed, returnees were provided with food that was non-diverse and poor in nutritional terms.
- Furthermore, in a case, there were different menus for returned and other participants during the in-flight phase. As provided in the Guide for Joint Return Operations by Air coordinated by Frontex (Chapter 6.1.8) “no distinction may be made between the food served to participants and returnees”.
- Whenever feasible, monitors suggest that returnees should be provided with food upon their request, and at maximum four hours after their last meal. Waiting time and delays may affect the situation and there is a need to have contingency planning in place.

#### **9. Further observations/recommendations from monitors and FRO**

Some monitoring bodies have approached the FRO and the ECRET with questions about the possibility to deploy two monitors from the pool to operations where there are many returnees or long-haul flights are foreseen. Another recurrent suggestion is to extend the mandate of the pool of monitors to cover all MSs participating in a JRO, and not only the contingent of the MS requesting a monitor, to ensure a European monitoring component to the pool. Further discussion is also advisable on the sharing of the report from a pool monitor -requested by a MS- to the monitoring bodies of other MS that take part in that operation.

- Two families complained that the authorities took 1000 euros from them and just left them 250 euros.

