



Study on coercive measures before removal of immigrants: From the perspective of the EU return directive

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Abstract

The removal of foreign immigrants is a manifestation of a country's sovereignty and has a bearing on its security. However, there are conflicts between the return of foreigners and the protection of human rights when taking coercive measures before the return of immigrants. The EU Return Directive adopts detention as a coercive measure before the return of immigrants, stipulates that the application of coercive measures should follow the principle of proportionality, set the maximum duration of detention, provide special places for immigration detention separated from ordinary criminals, ensure families privacy and the best interest of the child. There are gaps in the relevant Chinese legislation concerning the condition, duration, and place of detention. To improve China's immigration pre-removal coercive measures to balance national security interests and immigrants' human rights. China can draw on the relevant provisions of the EU Return Directive to establish the duration of detention pending removal, make the places of detention separated from ordinary offenders, Reflect special humanitarian care in detention for minors and families.

Keywords: EU Return Directive, pre-removal coercive measures, immigration detention, human rights protection

Introduction

The purpose of pre-removal coercive measures for immigrants is usually to confirm the immigrants' status or enforce a decision to remove ^[1]. Coercive measures are not punitive. Still, they are simply a measure of deprivation of personal liberty to ensure that an immigrant does not abscond before establishing the relevant status or enforcing the removal.

During the fight against the pandemic in China in 2020, several incidents of foreigners being repatriated for not complying with China's anti-pandemic measures ^[2]. What coercive measures can be taken against these foreigners if they refuse to leave the country? What are the conditions under which the different coercive measures apply? Can coercive measures also be taken if they are minors?

Although pre-removal coercive measures are not punitive, if the coercive measures are not properly prescribed, they may infringe on the rights of the foreigners. For example, prolonged temporary detention measures may seriously violate the right to personal liberty of the foreigners; the detention of foreigners awaiting removal in the same premises as ordinary offenders may also affect their fundamental rights. In practice, protecting migrants' rights and maintaining national security often show a negative correlation. When we mainly focus on protecting migrants' rights, a relatively lenient immigration repatriation system will be adopted, giving up the interests of the State to a certain extent. In contrast, when we pay more attention to the interests of the State, strict immigration repatriation measures will inevitably be adopted, making it difficult to consider the protection of migrants' fundamental rights. Therefore, it is crucial to balance protecting migrants' rights and dynamically maintaining national security. It is worth studying how to regulate the relevant provisions on pre-removal coercive measures complying with the requirement of human rights protection.

Entering the twenty-first century, the international community's management system for dealing with illegal immigrants has changed from a rigid stage to a flexible one. There is a trend of strengthening justice and limiting administrative power, and the rights of migrants are legally guaranteed. The fact that the rights of migrants are an important part of human rights has also become a new development in international human rights law ^[3]. The EU has established a relatively mature human rights protection system.

The EU Return Directive confirms the principles of international human rights protection consistent with the European Convention on Human Rights and International Bill of Human Rights, including the principle of non-discrimination, the principle of the best interests of the child, the principle of non-refoulement of refugees, and the principle of the right to family life. Although China is still a developing country with relatively weak human rights protection, the mature experience of the EU in dealing with migrants is still worthy of learning from based on China's national conditions.

Pre-removal coercive measures under the EU Return Directive

Relevant provisions of the EU Return Directive

The EU Return Directive is the most crucial legal document regarding the return of third-country nationals in EU. In 2008, the European Parliament and the Council issued Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter referred to as the "EU Return Directive"). The Directive sets out clear, transparent, and fair standard rules for returning illegally staying third-country nationals in the Member States, with full respect for fundamental human rights. The main objective is to harmonize the procedures followed by the Member States when returning illegal migrants, including a range of legal provisions dealing with the condition, duration, and place of detention pending removal.

From Articles 15 to 17 of the EU Return Directive, it appears that the coercive measures are mainly immigration detention, and it also establishes legal procedural guarantees for protecting the human rights of migrants by setting out the conditions, duration, and places of detention.

a. Conditions for taking coercive measures-the principle of proportionality

The European Court of Human Rights has gradually developed the principle of proportionality over a long period of judicial practice. Under this principle, the Court will examine the application of the provisions of the EU and its Member States. The examination aims to prevent the abuse of such provisions, including whether the provisions are applied for a specific purpose, whether they have the necessary urgency and whether they infringe on individual rights in a way that exceeds the rights and interests they are intended to protect. The principle of proportionality is a yardstick against the abuse of individual rights and a shield against public authority's excessive infringement of individual rights.

The application of coercive measures in the EU Return Directive reflects the principle of proportionality. Article 15 of the Directive states that if a third-country national is subjected to the return or removal process, detention is imposed only in cases where there is a risk of absconding or an intention to avoid or hamper that process. Moreover, the detention can only be imposed in cases where no more adequate and non-coercive measures cannot be effectively applied. In other words, non-coercive measures are the primary option, and coercive measures can only be applied in compliance with the principle of proportionality if non-coercive measures cannot be applied.

b. Regulations of the duration of detention-setting a maximum period of detention

Article 15 of the EU Return Directive sets out the basic requirement that the duration of detention "shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence." The maximum duration for detention is six months. Moreover, an additional 12 months will be granted if the return cannot be completed within the time limit because of a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries.

In the 2018 Amendments to the EU Return Directive, the Commission proposes that a person be detained for at least three months if there is a risk of absconding, impeding the execution of the return procedure, or threatening public order national security [4]. CCBE considers that setting a minimum period of detention is not in line with the requirement that "the period of detention should be as short as possible [5]." The available data shows no clear correlation between long periods of detention and removal effectiveness. Long periods of detention may even be counterproductive and do not encourage voluntary departures [6].

Although the EU Return Directive provides for a maximum detention period of 6 months (18 months in the case of extended detention), the practice varies considerably among the Member States. For instance, Greece has issued a legal opinion that a detention order can be issued on top of the 18 months for migrants who are undocumented and who do not cooperate in the removal process, while Italy has modified the maximum detention period to 90 days.

c. Provisions for places of detention - separation from ordinary criminals

The principle of human rights protection has impacted the provisions of detention places. Article 16 of the EU Return Directive provides that immigration detention shall be in particular places and, where this is not possible, shall be carried out in the prisons of the Member States but shall be segregated from ordinary criminals. This article also aligns with Article 4 of the EU Charter of Fundamental Rights, prohibiting inhuman or degrading treatment or punishment. Although the Directive is silent on details such as the size of detention cells, public health facilities, open spaces, nutrition, all detainees should be treated with "humanity and dignity" based on their human rights and international law [7].

By their legal nature, detention measures against migrants in the EU are administrative rather than criminal. Accordingly, places of immigration detention are not the same as places of detention for criminal offenders in general. Places of immigration detention can be relatively fixed places, such as police stations, prisons, immigration removal centers, or temporarily identified places, such as airport transit areas, ships, or hotels. The type of place of detention needs to be determined on a case-by-case basis, taking into account several factors, including the protection of the fundamental rights of migrants, the cost of repatriation and transfer, and the ease of transfer to other countries.

d. Statutes for minors and families - ensuring families privacy and the best interest of the child

The detention of minors and families is subject to special regulations, reflecting the EU principle of priority of human rights protection. Article 17 of the EU Return Directive provides that unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period. Suppose detention pending removal is imposed on a family, the family shall be provided with separate accommodation guaranteeing adequate privacy. During the detention, minors should be guaranteed both the possibility to participate in recreational activities and the right to education. This provision also reaffirms the principle of the best interests of the child.

Analysis on Relevant provisions of the EU Return Directive

From the above-mentioned EU provisions, it appears that the EU immigration detention provisions have several features

a. Emphasis on the principle of proportionality in the use of detention as a measure of last resort

In accordance with the principle of human rights protection, the EU emphasizes the principle of proportionality when applying detention measures. Member States may only resort to detention measures if there is a risk of absconding or an intention to evade or obstruct proceedings before a third-country national and if there are no more adequate non-coercive measures to apply effectively.

b. Special care for the place and duration of immigrants' detention

According to the EU Return Directive, places of immigration detention are distinguished from places of detention for criminal offenders in general, and the duration of detention should be as short as possible, with a maximum duration of six months set for each Member State.

c. Focus on the best interests of the child

The EU allows member states to impose detention pending removal on minors, which international human rights experts have criticized. However, totally prohibiting immigration detention of unaccompanied minors in favor of placement in other residential facilities is not necessarily consistent with the principle of the child's best interests. The facilities in which such groups are placed vary across the Member States, from residential homes to hostels. The relatively lax supervision of these facilities in some countries leads to large numbers of children disappearing, particularly in Belgium, the Czech Republic, Finland, Ireland, Italy, the Netherlands, Poland, and the United Kingdom^[8]. According to research, most children run away to be reunited with their families. Still, there is also evidence of traffickers abducting minors living in loosely supervised facilities. Exposing unaccompanied minors to an unsupervised environment may pose a danger to minors. Article 17 of the Directive responds to this problem by finding a balance between the principle of the child's best interests and the protection of the child's physical safety, an approach that deserves our consideration.

Pre-removal coercive measures under the Chinese law

Relevant provisions of the Chinese Law

China's Exit and Entry Administration Law and the Provisions on the Procedures for Handling Administrative Cases by Public Security Authorities (hereinafter referred to as the Procedural Provisions) provide coercive measures prior to the removal.

a. Types of coercive measures and conditions for their application

According to the above-mentioned legal documents, the coercive measures taken against foreigners include on-site or continued questioning, detention review, restriction of the activity area, and detention pending removal. The relative provisions are mainly found in articles 60-64 of the Exit and Entry Administration Law and articles 242-249 of the Procedural Provisions. Two of these measures - detention review and detention pending removal - involve detention, and have the greatest potential for human rights infringements.

1. Detention review

Detention review is an administrative coercive measure of limiting personal freedom used by the public security authorities and is applied to foreigners under serious suspicion of illegal entry or residence and whose identity is unknown or whose main facts of violation have not yet been ascertained^[9]. It is mainly found in articles 60, 61, and 63 of the Exit and Entry Administration Law and article 242 of the Procedural Provisions. Article 60 of the Exit and Entry Administration Law and article 242 of the Procedural Provisions stipulate the circumstances in which a foreigner may be subjected to detention review: After questioning on the spot or further questioning, no suspicion can be ruled out^[10], and further investigation is required. The written decision on detention review shall be provided to the foreigner concerned. The detention review may not exceed 30 days in general. An extension of 60 days may be granted if the case circumstances are complicated. For a foreigner whose nationality or identity is unclear, the period of detention review shall be counted from the day when the foreigner's nationality or identity is ascertained.

2. Detention pending removal

Detention pending removal is a measure of restriction of personal liberty taken to ensure that removal proceeds smoothly and to prevent the foreigner from evading his or her obligation to leave the country. The applicable

stages of detention pending removal and detention review are different. The former applies to the investigation stage, the latter applies when the facts of the foreigner's violation are clearly established and the removal cannot be carried out immediately.

The conditions for detention pending removal are set out in article 63 of the Exit and Entry Administration Law and article 248 of the Procedural Provisions: If a foreigner is decided to be deported, but such a decision cannot be executed immediately due to such objective reasons as weather, schedule of means of transportation, the party's health conditions, or the person's unclear nationality or identity, he or she shall be detained in a detention facility or repatriation venue.

b. Exceptions to the application of coercive measures

Article 61 of the Exit and Entry Administration Law and article 244 of the Procedural Provisions stipulates that the subjects not subject to detention review are mainly the elderly, the weak, the sick, the disabled, and the pregnant ^[11]. These foreigners shall be subject to measures restricting their activity area. As for detention pending removal, there are no provisions other than those governing the conditions and places. In practice, the detention pending removal is also carried out in detention facilities, and those who are not subject to detention under the investigation stage, also cannot be held in detention facilities under the pending removal stage [12]. This means that the elderly, the weak, the sick, the disabled, and the pregnant are not subject to either detention review or detention pending removal.

Analysis on Relevant provisions of the EU Return Directive

Compared with the EU Return Directive, there are some gaps in the Chinese relevant provisions of immigration detention:

a. The period of detention pending removal was not specified

The period of detention review is specified under the Exit and Entry Administration Law. Compared to the EU Return Directive, the duration of detention review is shorter in China. However, there is a vacuum in our legislation regarding the length of detention pending removal. The vacuum will result in "no way to enforce the law" and leave room for administrative power to infringe the human rights of immigrants.

b. The place of detention is not distinguished from other offenders

Article 63 of China's Exit and Entry Administration Law provides that persons who are decided to be deported but cannot be immediately executed are held in detention facilities or places of repatriation. In practice, foreigners in China who are subject to detention review and pending removal are generally held in detention facilities together with persons subject to administrative punishment. It is inappropriate to detain foreigners under detention review and pending removal together with those who are subject to administrative punishment. The law qualifies detention review as an administrative coercive measure. Under the investigation stage, the public security authorities had not yet ascertained the circumstances of the case, and there was no way to discuss punishment. Under the pending removal stage, the detention was only to implement the deportation decision successfully and was not punitive in itself, so it should also be qualified as an administrative coercive measure to restrict the personal freedom of the foreigner, rather than an administrative punishment.

c. The provisions of coercive measures for minors and families are too general to reflect the special humanitarian care

There is only one sentence dealing with minors under the Chinese Exit and Entry Administration Law. It provided that the detention shall not apply to the foreigner under 16. However, totally prohibiting immigration detention of unaccompanied minors in favor of placement in other residential facilities is not necessarily consistent with the principle of the child's best interests. Since exposing unaccompanied minors to an unsupervised environment may pose a danger to minors, such as abduction.

In addition, the EU Return Directive allows the Member States to impose detention on minors and families, ensuring family privacy, and minors' possibility to engage in leisure activities during the detention. In contrast, the Chinese relevant provision is too general to reflect the special humanitarian care.

Improvement of pre-removal coercive measures in China-based on the experience of the EU Return Directive

Pre-removal coercive measures ensure that forced removal could be carried out, which strongly safeguards national security and interests. However, we must also conduct a comprehensive weighing of national interests and human rights protection and seek a balance between them. China should better protect the basic rights and interests of migrants by improving procedural provisions so that our provisions on pre-removal coercive measures are both in line with the principles of international human rights protection and our national interests.

a. Clearly define the conditions for detention review and detention pending removal by drawing on the principle of proportionality

Article 248 of the Procedural Provisions provides the situation of detention pending removal but does not name it ^[13]. No provision further stipulates the conditions of detention pending removal. Hence, the definition of detention pending removal in the law should be clarified so that detailed provisions can be designed for it.

Article 63 of the Exit and Entry Administration Law could be split into two articles, providing for the separation of detention review and detention pending removal, with the addition of article 64, “A foreign national under detention pending removal shall be detained in a deportation center or a special deportation facility.”

Drawing on the principle of proportionality in the application of detention measures in the EU Return Directive, China could further clarify the conditions for detention measures as where there is a risk of absconding or where the foreign national intends to evade or obstruct the follow-up procedure, and where there are no more adequate non-coercive measures that can be applied effectively.

b. Specifying the period of detention pending removal

Administrative due process is an organic combination of the legality of the administrative process and the rationality of its operating mechanism, as well as the humanity of the administrative process in safeguarding human dignity ^[14]. The provisions concerning detention measures in the EU Return Directive reflect the administrative due process by setting a reasonable period for detention pending removal and requiring the competent authorities to issue a legal instrument to that effect.

Considering that the duration of detention pending removal is usually affected by the shift of the means of transport, the identification of the foreigner, and the issuance of identity documents, which can take several months, the duration of detention pending removal should not be set too short. The following provision could be added to the Exit and Entry Administration Law or Procedural Provisions: “The corresponding legal instrument shall be issued for the implementation of detention pending removal.” In addition, “The period of detention pending removal shall be as short as possible, and the preparations for deportation by the competent authorities shall be carried out simultaneously and without delay. The maximum period of detention shall not exceed six months. The period may be extended by an additional six months if the foreigner refuses to cooperate or if there is a delay in the issuance of the foreigner's valid documents.”

c. Dedicating the place of immigration detention and separate it from that of other offenders

The United Nations Human Rights Committee commentates decisions regarding the detention of immigrants must consider the effects of detention on their physical and mental health. Any place of necessary detention should be an appropriate, sanitary, non-punitive facility and should not be a prison [15]. Based on practical considerations, Article 16 of the EU Return Directive provides that detention shall be conducted in specialized facilities. Suppose a Member State cannot provide accommodation in a specialized facility and is obliged to resort to prison accommodation. In that case, the third-country nationals in detention shall be kept separated from ordinary prisoners.

The detention of migrants pending removal is not a punitive measure, so it is inappropriate to detain migrants pending deportation in detention facilities with other persons who have violated the law. However, only a few regions in China have established special detention centers for foreigners. Drawing on the EU Return Directive provisions, Article 63 of the Exit and Entry Administration Law could delete the words “detention facilities” and replace them with “persons detained for examination or awaiting repatriation are held in a special detention facility or repatriation facility.” As a repatriation center is currently under construction in China, it is proposed that foreigners in detention pending repatriation should be detained in repatriation centers, which should also be designed and constructed in a different environment from that of detention centers.

d. Reflecting special humanitarian concern in the detention place and manner of minors and families

The EU Return Directive, which allows for the detention of minors, has attracted some criticism. However, suppose such minors are left unsupervised in a liberal environment, they will be easily exposed to danger situations, such as being used by human traffickers and being enticed and encouraged to commit further offenses to remain in the country. Furthermore, rights cannot be realized without fulfilling obligations. Article 32 of the Chinese Constitution, in addition to explicitly protecting foreigners' legitimate rights and interests, also stipulates those foreigners who are minors in China must also abide by Chinese laws.

Hence, considering the two reasons mentioned above, totally prohibiting immigration detention of unaccompanied minors may not be the most appropriate legislation. It is recommended that, to the extent that the minors are allowed to be held in detention pending removal, special humanitarian care, as distinct from the general population, should be provided in other areas.

In this regard, reference may be made to the provisions of the EU Return Directive, which ensures that detention pending deportation is applied to minor migrants only when no alternative measures are available and, if so, for a minimum period. During this period, the minors' basic needs and physical and mental health should be ensured, considering the principle of the child's best interests. Suppose immigration detention is imposed on a family. The family should be provided with a separate accommodation that can guarantee adequate privacy.

Conclusion

Coercive measures before removing immigrants are an effective measure to safeguard national security and interests. The Chinese overall national security concept proposed by General Secretary Xi Jinping adheres to the importance of national interests, takes people's security as the purpose, takes political security as the root, promotes international security as the backbone, integrates external and internal security, homeland security, and national security, and resolutely safeguards national sovereignty, security and development interests. While

safeguarding national security, General Secretary Xi Jinping further proposed the concept of a “community of human destiny.” Building a community of human destiny requires improving global governance. International migration governance is a major challenge for global governance, which must consider national interests while not neglecting the human rights protection of migrants.

Based on the EU's experience, China's legal system of pre-removal coercive measures can be integrated with the advantages of Chinese legislation, focusing on judicial practice and realistic national conditions, and guided by the overall national security concept and the socialist concept of human rights protection with Chinese characteristics. Consequently, China's international migration governance can operate in a standardized manner on the track of domestic and international law, demonstrating China's modern governance capacity.

References

1. International Organization for Migration, Glossary on Migration, 2019, 47-48.
2. Yanta Public Security, Information Bulletin, 2020. Retrieved on 30 March, 2020, from https://weibo.com/5131919693/IAU0qwQGG?from=page_1001065131919693_profile&wvr=6&mod=weibotime&type=comment.
3. Liu Hongbin, Introduction to International Migration, People's University of China Press, 2015, 92.
4. European Commission, Proposal for a Directive of The European Parliament and of The Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals(recast), 2018, 8.
5. CCBE is recognized as the voice of the European legal community, with a membership of 45 national bar associations and law societies from the European Union, the European Economic Area and Europe at large. It regularly acts as a liaison between its members and European institutions, international organisations and other legal organisations around the world. Areas of particular interest include the right of access to justice, the digitization of the judicial process, the development of the rule of law and the protection of clients by promoting and defending the core values of the profession. See the official CCBE website for details: <https://www.ccbe.eu/about/who-we-are/>.
6. European Commission, CCBE comments on the Commission proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2019, 3.
7. European Commission, Communication From the Commission to the Council and The European Parliament on EU Return Policy, 2014, 18.
8. See Amanda Levinson, Unaccompanied Immigrant Children: A Growing Phenomenon with Few Easy Solutions, 2011. etrieved on 25 May,2020, from <https://www.migrationpolicy.org/article/unaccompanied-immigrant-children-growing-phenomenon-few-easy-solutions/>.
9. Lai Peiwen, An Analysis of the Protection of Foreigners' Fundamental Rights under the Detention Review System, Western Law Review,2015:2:37.
10. The term "suspected" refers to those who are: 1. suspected of illegally leaving or entering the country; 2. suspected of assisting others to leave or enter the country illegally; 3. suspected of staying or working illegally; and 4. suspected of endangering the interests of national security, disrupting public order or engaging in other illegal or criminal activities.
11. Article 61 of the Exit and Entry Control Act stipulates that: An alien shall not be subject to detention review under any of the following circumstances, and the scope of his or her activities may be restricted: 1. if he or she is seriously ill; 2. if he or she is breastfeeding a child under the age of one year; 3. if he or she has not reached the age of 16 or has reached the age of 70; and 4. in other cases where detention review is not applicable.
12. Article 12 of the Regulations on Detention Facilities provides that: If a person should not be detained in accordance with the provisions of article 21 of the Law of the People's Republic of China on Punishment for Public Security Administration, the detention facility shall not take him into custody and shall notify the authority deciding on the detention. Article 21 of the Law of the People's Republic of China on Punishment for Public Security Administration: Administrative detention shall not be carried out in any of the following circumstances: 1. if the person has reached the age of 14 and is under the age of 16; 2. if the person has reached the age of 16 and is under the age of 18 and has violated public security administration for the first time; 3. if the person is over the age of 70; and 4. if the person is pregnant or nursing a child under the age of one year.
13. Article 248 of Provisions on the Procedures for Handling Administrative Cases by Public Security Authorities: A foreigner falling under any of the following circumstances shall be taken into custody at a detention facility or repatriation venue: (1) The person is detained for investigation. (2) It is decided that the person shall be repatriated or deported but such a decision cannot be executed immediately due to such objective reasons as weather, schedule of means of transportation, the party's health conditions, or the person's unclear nationality or identity.
14. Chen Chi, The Value Basis of Due Administrative Procedures, Modern Jurisprudence,2005:2:188.
15. Human Rights Committee, General comment No. 35 Article 9 (Liberty and security of person), 2014, 6.