

## **Besluit over de weigering van de Europese Commissie om opening van zaken te geven over een informele regeling met Gambia over het terugsturen van migranten (zaak 1271/2022/MIG)**

Besluiten

**Zaak 1271/2022/MIG - Geopend op 15/07/2022 - Besluit over 01/09/2022 - Betrokken instelling** Europese Commissie ( Geen wanbeheer vastgesteld ) |

De zaak betrof een verzoek om het publiek toegang te verlenen tot documenten in verband met een informele overeenkomst inzake de terugkeer en overname van illegale migranten die de EU met Gambia had gesloten. De Commissie weigerde de toegang met het argument dat openbaarmaking de internationale betrekkingen zou kunnen ondermijnen.

Het onderzoeksteam van de Ombudsman heeft het document in kwestie bestudeerd, evenals – in het kader van een parallel onderzoek – vijf soortgelijke overeenkomsten met andere niet-EU landen en daarmee verband houdende documenten. Op basis hiervan en rekening houdend met de ruime beoordelingsmarge waarover de EU-instellingen beschikken wanneer zij van mening zijn dat het openbaar belang wat betreft internationale betrekkingen in gevaar is, heeft de Ombudsman vastgesteld dat het besluit van de Commissie om toegang te weigeren niet kennelijk onjuist was. Aangezien het algemeen belang in kwestie niet kan worden vervangen door een ander openbaar belang dat belangrijker wordt geacht, sloot de Ombudsman het onderzoek met de bevinding dat er in deze zaak geen sprake was van wanbeheer. Evenwel moet opgemerkt worden dat alles in het werk moet worden gesteld om het publiek ervan te overtuigen dat de grondrechten van migranten voldoende worden beschermd en dat er in dit proces adequate waarborgen voorhanden zijn.

Background to the complaint

**1.** The EU and its Member States have established common rules [1] for managing the return of irregular migrants to their country of origin. In this context, the EU cooperates with countries of origin of irregular migrants through readmission agreements. These are legally binding agreements that set out the obligations and procedures for both sides as regards the readmission of migrants who do not have a right to stay in the EU.



2. As some third countries seemed reluctant to conclude a formal readmission agreement, the EU started - in 2016 - to negotiate informal, non-binding 'arrangements' for return and readmission with non-EU countries. Since then, the EU has entered into six such arrangements. [2]

3. In March 2021, the complainant made a request [3] to the European Commission for public access to the EU's informal readmission arrangement with the Gambia.

4. The Commission refused to give access to the requested document based on the need to protect the public interest as regards international relations [4]. The Commission argued that disclosure would undermine the relations between the EU and its Member States with the Gambia and that it would jeopardise possible future negotiations of similar agreements with other third countries.

5. In April 2021, the complainant asked the Commission to review its decision to refuse access (by making a 'confirmatory application') and to disclose at least parts of the arrangement.

6. In September 2021, the Commission confirmed its decision to refuse access.

7. Dissatisfied, the complainant turned to the Ombudsman in July 2022.

The inquiry

8. The Ombudsman opened an inquiry into the Commission's decision to refuse to give public access to the informal arrangement on return and readmission of migrants between the EU and the Gambia.

9. In the course of the inquiry, the Ombudsman inquiry team inspected the arrangement at issue. The Ombudsman also gave the Commission the opportunity to provide additional views but received none.

10. In a parallel inquiry [5] concerning the Council of the EU, the Ombudsman inquiry team also reviewed all informal readmission arrangements that the EU has concluded since 2016 as well as a number of documents related to the negotiations leading up to them.

## Arguments presented

11. In essence, **the complainant** argued that, due to the context and circumstances of the arrangement and the conduct of the parties to it, it must be assumed that the arrangement is intended to be legally binding. It should thus be published in the Official Journal of the EU.

12. The complainant also contended that the exception for the protection of the public interest as regards international relations cannot be applied here. She said that the Commission claims that the arrangement at issue is of a mere procedural nature. However,



in her view, only a substantive agreement could justify the use of the exception invoked.

**13.** In addition, the complainant was of the opinion that the public interest as regards international relations should have been weighed against the need for sufficient protection of the fundamental rights of migrants, and raised concerns about a potential lack of such safeguards. The complainant added that disclosure of the arrangement would reinforce the legitimacy of the measures taken by the EU.

**14. The Commission** stated that the arrangement at issue had been concluded under Article 17(1) of the Treaty on the Functioning of the EU and that is not intended to create any legal obligations. Rather, it *“established a structured and predictable cooperation mechanism (...) for the return of own nationals. It contains practical information regarding the return and readmission procedure, such as the description of the applicable steps and timelines for identification of third country nationals who are illegally staying in the EU, the issuance of travel documents and organisational aspects of return operations.”*

**15.** The Commission argued that the Gambia’s cooperation was voluntary and politically very sensitive and that, due to the non-binding nature of the arrangement, its implementation depends on the Gambian authorities’ willingness to follow the agreed practices.

**16.** The Commission concluded that disclosure could result in a serious and damaging loss of trust in the relations with the Gambia concerning the area of readmission and beyond. The Commission added that this risk was real. For example, in the past, another country had refused to finalise and implement a similar arrangement after the public had become aware of the ongoing negotiations.

**17.** Finally, the Commission argued that disclosure might undermine the EU’s negotiating position in relation to other readmission arrangements.

## The Ombudsman's assessment

**18.** The EU institutions enjoy a wide margin of discretion when determining whether disclosing a document would undermine any of the public interests protected under Article 4(1)(a) of the EU legislation on public access to documents (Regulation 1049/2001), such as the protection of international relations. [6]

**19.** As such, the Ombudsman’s inquiry sought to determine if there was a manifest error in the Commission’s assessment on which it based its decision to refuse access to the readmission arrangement at issue.

**20.** To that end, the Ombudsman inquiry team inspected the document. Due to a parallel inquiry [7], the inquiry team could also compare the content of the arrangement in question to that of other informal readmission arrangements the EU has concluded. On



the basis of the information obtained during these inspections, the Ombudsman finds that it was not manifestly wrong for the Commission to consider that disclosure could undermine the public interest as regards international relations.

**21.** Specifically, having reviewed the content of the readmission arrangements, the Ombudsman confirmed, for example, that the EU took a differentiated approach towards the various return countries concerned. The Ombudsman therefore finds the Commission's view reasonable that disclosure would undermine the EU's negotiating position, both in ongoing and future negotiations, and that it would undermine return countries' willingness to cooperate.

**22.** Given the sensitive nature of the information contained in the arrangement at issue, the Ombudsman also considers that the Commission provided the complainant with adequate reasons for its decision to refuse access.

**23.** The public interests protected under Article 4(1)(a) of Regulation 1049/2001 cannot be superseded by another public interest that is deemed more important. This means that, if an institution considers that any of these interests could be undermined by disclosure, they must refuse to give access. Thus, whilst the complainant raised important concerns as regards the fundamental rights of migrants, her arguments in favour of the existence of an overriding public interest in disclosure cannot be taken into account.

**24.** The same holds true as regards the nature of the document at issue. Nevertheless, the Ombudsman notes that the arrangement is non-binding in nature, which is clear from its content.

**25.** In light of all this, the Ombudsman finds that the Commission was justified in refusing to grant public access. That said, given the concerns raised by the complainant (see paragraph 13), every effort should be made to reassure the public that the fundamental rights of migrants are sufficiently protected and adequate safeguards are in place in this process.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

**There was no maladministration by the European Commission in refusing access to the informal readmission arrangement at issue.**

The complainant and the Commission will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 01/09/2022



[1] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive'): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0115&qid=1606153913679>

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[2] With Afghanistan, Bangladesh, Ethiopia, the Gambia, Guinea and the Ivory Coast.

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> .

[4] In accordance with Article 4(1)(a) of Regulation 1049/2001.

[5] Case 815/2022/MIG on the refusal by the Council of the EU to grant public access to documents concerning informal arrangements with non-EU countries about returning migrants (readmission agreements):

<https://www.ombudsman.europa.eu/en/case/en/61589> .

[6] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission* , T-644/16:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=>

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[7] See footnote 5 above.