A race to the bottom: Harmonisation of where and how asylum applications are dealt with

Increased integration of the EU, in terms of free movement of workers and citizens, has raised new issues and complications for national asylum and immigration systems, since non-EU citizens are also able to move freely. This is particularly true between the so-called *Schengen* countries: the signatories of the 1985 Schengen Convention on the elimination of internal border controls.

Following the lifting of border controls, some people were falling outside international protection: no Member State would accept responsibility for their applications, claiming that they had travelled through other Member States to arrive at their final destination. This was widely used in the European media to demonise asylum seekers as 'asylum shoppers': choosing the best deal rather than emergency protection.

As a consequence, a new concept in asylum law was developed: the notion of a **'safe third country'**. The new notion sits uneasily alongside the right against **refoulement,** as enshrined in the Geneva Convention (Article 33), as well as subsequent European and international human rights law (e.g. Article 3 of the European Human Rights Convention). This means that, without exception, states must not send people back to countries where there is a well-founded fear that they will face death, torture or degrading or inhuman treatment.

It was assumed that while the asylum systems of the Member States were different, all EU (then EC) countries respected human rights and did not present fears of persecution. Therefore, in cases where asylum seekers had crossed numerous internal borders, the Schengen Convention contained initial rules determining which country should be responsible for the application process based on the safe third country rule. In 1997 a specific flanking Convention was adopted in Dublin. This Convention created rules and bodies to determine two matters:

- the criteria used by Member States to determine which country is responsible for an asylum application; and
- the procedure for sending an asylum seeker back to the country responsible if found applying for asylum in another Member State.

Both the Schengen and the Dublin Conventions were agreed on an intergovernmental basis outside the structures of the EU.

The Dublin Convention was intended to ensure a fairer balance in terms of the number of asylum applications lodged in the different Member States. However, one of the main effects has been a downward competition between Member States, not wishing to seem more favourable or attractive than their neighbours. For instance, in 1991, the French introduced restrictions on work entitlements, which were quickly adopted by the Germans and today are applied in virtually all Member States. The use of accelerated procedures at airports is another example: France, the Netherlands and Denmark had all introduced such legislation before Germany did in 1993.

Increasingly, the introduction of more restrictive, inhumane procedures in one Member State has not raised condemnation from other countries, but rather a perverse admiration.

This has created a situation in which the definitions of refugee and other forms of international protection so carefully interpreted and defended by human rights organisations are undermined daily through the application of unfair and unjust procedures.

HARMONISATION ON TOP OF THE AGENDA

Since 1999, and the ratification of the Treaty of Amsterdam, the EU Member States and institutions have been working on the harmonisation of European asylum and immigration systems. The harmonisation of asylum procedures is one of the central pillars of this policy. A single European asylum and immigration policy should mean that in whichever EU Member State a person is seeking asylum, he/she follows the equivalent fair and just procedures.

This has been one of the most contentious areas of harmonisation. Many of the political debates are difficult to stomach. All national governments and politicians are under popular pressure to both restrict the number of people entering their countries and to make it more difficult for those who do to claim asylum.

While initially a small number of governments tried to create a genuinely fair procedure for asylum seekers, some of the larger Member States (UK, Germany etc) have consistently tried to reduce the rights available to asylum seekers.

There are two main mechanisms of legal and policy harmonisation:

- the Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status, and
- the Council Regulation establishing a series of criteria to decide which Member State is responsible for an asylum application. Adopted in February 2003, and entered into force in March 2003.

The latter Regulation aims to complete the work of the Amsterdam treaty on incorporating the Schengen and Dublin Conventions into the EU policy on asylum and immigration. The renewal and extension to two non-Schengen countries, Ireland and the UK, of the provisions on determining the country responsible for an application have already been concluded.

HARMONISATION OF PROCEDURES

In September 2000, the Commission presented a first draft for a Directive on asylum procedures[1]: i.e. the procedures that must be followed when an application for asylum is lodged. The Commission did not aim to create a common procedure but rather set out a common set of standards to align national rules, and to start the process of harmonisation. In September 2001, the European Parliament adopted a resolution on the legislation calling for improvements in the text to ensure that adoption would not lead to the reduction of existing legal protection for asylum seekers.

[1] Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2000/0578 final

Following the debate in the Council and the European Parliament, an amended proposal was presented in 2002[2]. The amended proposal took on a number of amendments recommended by the European Parliament, as well as suggestions proposed by different Member States. The minimum standards proposed include:

- Procedural guarantees – e.g. information about the procedure in a language that the asylum seeker understands to an adequate level, the opportunity to be interviewed, access to legal assistance.
- Minimum requirements regarding the decision-making process – e.g. decisions must be taken on an individual basis, must be objective and impartial, and be conducted by personnel specialised in asylum and refugee matters having received appropriate training.
- Common interpretation of certain concepts, which already exist in the majority of Member States on the basis of different criteria – e.g. what constitutes a 'manifestly unfounded application', an 'inadmissible application', a 'safe third country' and a 'safe country of origin'.
- Provisions on the right to appeal against negative decisions
- Provisions on detention – states cannot detain a person simply for being an applicant for asylum.

However, a number of other additions were included at the behest of the Member States, e.g.

- special standards on two new types of accelerated procedure: 1) to examine applications lodged at the border or on entry to the territory, and 2) to assess the need for a subsequent new application.
- The definition of 'inadmissible application' was extended to those indicted by the International Criminal Court or whose extradition has been requested by another state.

Following months of political horse-trading, in April 2004 the Council finally adopted a general approach to the Directive. Normally this would mean that the Directive has been formally adopted, but because so many changes were made to the text in the course of the Council discussions it has been forwarded to the European Parliament for a further consultation. This means that a Rapporteur will be appointed in the Justice and Home Affairs Committee and a report will be adopted in the last few months of 2004.

'*The cumulative effect of these proposed measures is that the EU will greatly increase the chances of real refugees being forced back to their home countries*'
Ruud Lubbers, UN High Commissioner for Refugees (March 2004)

Extension of the safe third country principle: shirking the responsibility to care?

According to international law, an asylum application must be heard where it is lodged. One of the most contentious areas of this legislation is that the EU as a whole has abandoned this basic legal provision. As a result there are doubts that the **non-refoulement** principle will be respected in the event that an application is considered to be the responsibility of another safe third country.

The legislation opens the possibility for Member States to consider asylum seekers' applications as inadmissible on a number of grounds: e.g. because they have travelled through neighbouring countries, or may have a link with another country.

[2] (Amended) Proposal for a Directive on common minimum standards on procedures for granting or withdrawing refugee status, COM(2002)326

It is fundamental that responsibility for an asylum seeker should only be transferred in certain circumstances, e.g. if a strong, meaningful link exists with a safe third country. Then asylum seekers should only be transferred to countries which have ratified the Geneva Convention, respect human rights more broadly and have a functioning legal asylum system.

However, the national governments are moving a totally different direction. Despite the fact that the European Parliament voted against the elaboration of a list of safe third countries in September 2003, rejecting an Austrian-proposed Council Regulation on the basis that there should first be a truly European asylum procedure, before safe third states are identified. Through the Directive on procedures, the Member States have decided to extend the list of those countries worldwide defined as 'safe third countries' dramatically, and increased their possibilities to transfer people to other countries.

To ecumenical organisations and those such as the European Council for Refugees and Exiles (ECRE), which represents national refugee councils, this constitutes a shirking of responsibility and is potentially putting vulnerable people in danger.

On the one hand, a number of countries have been highlighted collectively at EU level, which supposedly do not present asylum seekers with a fear of refoulement. At present these include Bulgaria, Benin, Botswana, Cape Verde, Chile, Costa Rica, Ghana, Mali, Mauritius, Romania, Senegal and Uruguay. In the forthcoming months, national governments will make further proposals for safe third countries.

On the other hand, Member States are allowed to develop their own national lists of safe third countries, whether based on the EU criteria or their own national criteria. This is potentially very worrying. Who will determine and police these standards – the Member States that have already demonstrated their lack of political will to defend the rights of asylum seekers and refugees?

To make matters more complex, through the accelerated procedure at the border, the Member States have included a notion of a **'super safe third country'**. According to lawyers in the field, this concept allows Member States to refuse to examine applications and the physical condition of an applicant who has travelled through a country, which has ratified the Geneva Convention and the European Convention on Human Rights, and has an asylum procedure. This denies asylum seekers the most basic rights to be heard, since there is no obligation on the super safe third country to process the application leading to the possibility that people will be passed on indefinitely.

This policy is distinctly inhuman in its consequences. Many of the people arriving at the borders of Europe have been forced to flee death or torture. This policy is responsible for the increased destruction of personal documents by asylum seekers – the very destruction of their past and identity – making it impossible to conduct a proper asylum procedure and pushing vulnerable individuals into the precarious position of undocumented migrants (see **Briefing Paper 4**).

Furthermore, the international right to non-refoulement commits countries to take certain measures before moving an asylum seeker to another country. According to leading refugee lawyers, if states are considering sending an asylum seeker to another country, they must undertake an individual examination of the particular circumstances of each asylum seeker and ensure that a **right of appeal** is respected. These are minimum safeguards to ensure that

individuals are not sent into dangerous situations. However, currently, the minimum standards set in draft EU legislation fail to respect this right since asylum seekers have no mandatory right to appeal decisions to return them to a safe third country (for more information, see www.ecre.org).

WHAT CAN YOU DO?

The Directive on procedures for granting and withdrawing refugee status has not yet been formally adopted at European level, despite the political agreement reached at the end of April 2004. The Council of Ministers must now formally consult the European Parliament. This started in September 2004.

It is important to recognise that the European Parliament has been proactive on this issue, calling consistently for improvements in the legal texts and rejecting a number of governmental proposals. Proof that contacting your MEP and monitoring their behaviour in this matter has been and will remain crucial.