



Churches' Commission for Migrants in Europe

Commission des Eglises auprès des Migrants en Europe

Kommission der Kirchen für Migranten in Europa

The Case against Carriers' Liabilities

Contribution to the Round Table on Carriers' Liability related to Illegal Immigration, Brussels, 30 November 2001, organised by IRU, IATA, ECSA and UIC

As Christian organisations we hold the fundamental belief that those who are threatened with persecution should be offered sanctuary. We welcome attempts by the European Union to create a common system that will “[a]bsolutely respect the right to seek asylum ... [and] ensure that nobody will be sent to a country where he faces the renewed risk of persecution”¹. As the Member States confirmed at the Tampere Summit in October 1999: “It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.” The European Commission has acknowledged the need to “tak[e] account of protection needs in legitimate measures to combat illegal immigration”: the best possible asylum system is of limited value if those individuals who are in need of protection are unable to access the territory in order to avail of it.

Refugees and Documents

1. It has always been recognised that refugees often cannot acquire the full documentation normally required to enter another country, and the 1951 Geneva Convention makes explicit provision for this scenario.² Those fleeing persecution may be refused passports and/or exit visas by the authorities; indeed, where those authorities are themselves responsible for the persecution feared, it often is too dangerous to approach them. Other refugees come from collapsed states, where there are no central authorities to issue documents. Even where a refugee has a passport, he or she has a further hurdle to overcome in attempting to acquire a visa from the country of destination.

2. While Christian organisations acknowledge the state’s right to control who enters the territory, the effect of carrier sanctions is to deny access to the state territory to all people with inadequate documentation, regardless of the fact that they may be refugees. There are no figures available how many refugees were effectively denied travel opportunities due to a lack of documentation. However, it is known that quite a large number of refugees, whose need for international protection was recognized by granting them asylum or complementary protection, had entered Europe without sufficient documentation and by handing themselves over to smuggling or even trafficking networks³.

¹ Communication from the Commission to the Council and the Parliament: “Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum”, November 2000, Section 1.2.

² Convention on the Status of Refugees 1951, in particular Articles 31 and 33.

³ Morrison for UNHCR, 2000.

3. In European history, e.g. when persons had to flee from persecution during the Nazi regime in Germany, we do have similar stories. If we take note of individual biographies of exiles⁴, there are stories that they had to purchase a passport, that they even divorced and married a national of another, safe country and paid for this. Many of these exiles would not have been able to prove that they personally were already threatened, but if they had stayed on, they would have risked their lives. A look at this history is important, as it was also against this background that the International Declaration of Human Rights, the European Convention on Human Rights and the Refugee Convention were agreed upon as humanitarian principles. Against this background also, a number of countries had explicit and favourable asylum laws enshrined in their constitutions.

4. As organisations dealing on a very practical level with refugees arriving in European countries after being trafficked or smuggled, we would like to give a concrete face to how people travel today:⁵

- An Afghan woman: The country of origin is Afghanistan; she belongs to an ethnic minority and was threatened several times by the Taliban to stop working as a doctor because she is a woman. She travelled from Afghanistan – Turkmenistan – Russia – transiting through other countries to Austria. After applying for asylum in Austria in August 1999, she was recognised as a refugee according to the Geneva Convention in June 2001. The travelling/smuggling costs amounted to 4.500 USD.
- A man from Ukraine was imprisoned for having reported criminal activity by senior Ukrainian officials to investigators. He fled with a false passport via Poland into EU territory and applied for asylum in a second EU Member State⁶ in April 1999 where he was recognised as a refugee in February 2001. The travel and smuggling costs amounted to 2.500 USD.
- A Turkish teacher was suspected for affiliation with the Kurdish Workers Party (PKK). He escaped from Istanbul via Italy to Switzerland, where he applied for asylum in April 1994 and recognised as a refugee according to the Geneva Convention in April 1996. The costs for his travel amounted to 6.700 DEM.

5. A lot more can be said about the routes and means of transport taken, but none of these persons would have been able to travel with any ordinary means of transport. And we regard this as a direct consequence of the imposition of the so-called “non-arrival” policy of the European Union Member States. Besides the establishment of the visa requirement for citizens of refugee producing countries and tightening border controls one of the focal tools of this policy was establishing carrier sanctions.

6. States are obliged to respect the principle of non-refoulement to a situation of risk, but one cannot expect carriers to take into consideration this principle. Particularly when they are faced with penalties, carriers would rather not take a person aboard, and by doing so leaving the person in the situation of risk of persecution, exposing them to inhuman or cruel treatment or torture.

⁴ one example: A. Schrobsdorff, Du bist nicht wie andere Mütter.

⁵ These cases were presented to the Migration Forum of Caritas Europe in November 2001.

⁶ For reasons of personal security, the names and countries are not named although they are known.

Carriers' Responsibility

7. Member states of the European Union have introduced carrier liability acts, penalising the transport of persons without sufficient documents since the 1980s, and incorporated this measure in the Schengen Convention. Now it is to be harmonised among EU member states. The aim has been to reduce the number of asylum seekers not eligible to refugee status. Some countries waived the fine for persons who were admitted in the asylum procedure. In effect, this has been a shift of the burden of immigration control to carriers. However, this can be seen as a privatisation of state obligations. Carriers work in line with economic criteria, and have to do so. In order to reduce possible penalties, they have introduced extensive checking facilities particularly at the airports as the major ports of international travel. But carriers, even if they may ethically be in favour of refugee reception, have no legal obligation towards refugees. Their personnel are not trained, nor would it be acceptable if they took a decision on the validity of a founded refugee claim. The individual case examination is in this situation no longer guaranteed. But as a fine is waived only in the case of persons accepted into the asylum procedure, they carriers might feel an economic urge to check the validity of a claim or – if the carrier wants to be in the safe side – does refuse to transport not adequately documented persons. There is no incentive for carriers to ensure that a refugee gains access to the territory, whereas they face a heavy penalty if the person is subsequently denied access to the procedure.

8. While major concern, and probably the most extensive checking on documents, is with airlines and airports, carrier sanctions are also valid for road, rail and sea carriers. For the rail transport, the Calais-Dover route is certainly the one which receives most attention with numerous persons trying to enter the United Kingdom without documents through the tunnel. In the Mediterranean the concern is more on ferries, however, as ordinary ferries would have to face penalties as well, most smugglers and traffickers resort to other, often insecure boats. Due to the tight controls, smugglers and traffickers earn a fortune, charging more than an ordinary fare would cost, and put people's life at risk. The loss of lives at European borders has reached the thousands over the past decade, and if we are serious about saving lives, this consequence of tightened border controls needs to be addressed.

9. Small carriers, like taxi drivers at borders, are also held liable for carrying undocumented persons. These are small entrepreneurs and the burden of penalties is putting at risk their enterprise. This has led to serious discrimination that they simply denied carrying persons even if they were already on the territory or would have been able to provide documents, as a documentation on taxi drivers at the German-Polish border shows.

10. A consequence of carrier sanctions is that carriers use similar measures as sometimes immigration officers, a methodology described as "profiling". A person from Ghana is more likely to be checked and questioned about the validity of documents than a person from the US. Black nationals of EU Member States are more often checked and questioned about the validity of their papers, even inside the EU, than whites. In border areas, they may not find a taxi at a station even if they were not undertaking cross-border travel.

Legal concerns:

11. Carriers have challenged the liabilities on various grounds. However, often they argued that the penalties in their country were higher than in other countries and therefore placing them under unfair conditions; therefore they have been challenging the negative effects on competitiveness.

12. Carriers in Austria, challenging the constitutional conformity of carrier sanctions, took a different, and more fundamental approach. The Constitutional Court followed their arguments and suspended the carrier sanctions with its decision of 1 October 2001.⁷ The main reason given in the Court's ruling: the law on carriers' liability when establishing the carriers' obligation to provide information to border control authorities is not specified and clear enough and therefore resulting in uncertainty of law.

13. The provision, so the Constitutional Court, did not state clear enough what exactly was expected from the carriers. Were they merely to check whether people had documents or were they obliged to examine these documents' validity? If carriers were to examine the document, how far did they need to go? Was it enough to make a prima facie evaluation or should they go into detailed analysis of documents provided? Finally, if the carriers found that a person was not properly documented, did the carriers have to take into consideration the obligations of the Geneva Refugee Convention of 1951? Obviously the law made it difficult for carriers to get a clear picture on what exactly they were obliged to do.

14. But many more concerns exist regarding the constitutional compliance of carrier sanctions. In its decision to start the procedure examining the conformity of the respective legal provision the Constitutional Court in Austria in June 2001⁸ raised additional concerns. The Court stated that it needs to be closer examined whether obliging someone to deliver services (contributing to official tasks) free of charge might be in breach of Art. 1 of 1. Protocol of the European Convention on Human Rights with regard to protection of property. Finally the Court stated that there is need for examining whether fining carriers independent of concrete guilt would be in breach of the basic constitutional principle of equal treatment.

Challenges and Conclusions:

15. Christian organisations and humanitarian organisations have raised the concern about the consequences of the imposition of carrier sanctions for many years.⁹ From the humanitarian point of view, the effects can be summarised in two ways from the humanitarian perspective:

- High risk for persons in need of international protection not to have access to safe territory.
- Forcing persons into the hands of smugglers and traffickers.

⁷ Decision by the Constitutional Court in Austria G224/01 of 1 October 2001

⁸ Constitution Court in Austria, B544-549/01

⁹ an early example is the CCME Briefing paper no. 17 on Carrier Liabilities in the Member States of the European Union by Antonio Cruz, August 1994.

16. The efforts of carriers to challenge the consequences of carriers' liabilities are appreciated, however, we would encourage carriers as organisations with international outreach and experience also to work more intensively not only on economic consequences but on ethical issues like discrimination due to profiling in the immigration procedures and refugees. Carriers are well-placed in sharing experience in international encounter and thus in demanding fair and transparent procedures. They could also play a role in changing images, clearly stating the persons in need of protection should not be depicted as bogus asylum seekers.

17. Carriers ought to have an interest in clear, transparent and accessible regulations for travelling in order to have regulated travel. We are convinced that easier access would reduce the amount of smuggling and trafficking – and this may in turn prove less expensive in money, certainly in lives, than the present system.

18. As carriers are also obliged to participate in deportations as a consequence of liabilities, they could also cooperate with humanitarian organisations to render more humane deportation orders as recommended by the Council of Europe. We would commend the actions taken by some pilots' organisations which protested against violence exercised during expulsion orders and would hope that similar actions would not be penalised by the carriers but rather taken up in an ethical code of conduct for employees.

19. Finally, we would recommend a continued dialogue and cooperation between carriers, governments and humanitarian Non-Governmental Organisations in order to find adequate solutions to the legitimate interest to control immigration, the obligation to protect persons from persecution, and to have access to means of international and national travel without discrimination.

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