Churches´ Commission for Migrants in Europe
Commission des Eglises auprès des Migrants en Europe
Kommission der Kirchen für Migranten in Europa

Comments on the Communication from the European Commission on Immigration, Integration and Employment (COM (2003) 336 final) - April 2004
Churches & Christian Organisations in Europe on Migration and Asylum - Updated March 2004
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Joint Comments on the Communication from the European Commission on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents. - January 2004

Migration and Development: Preliminary observations by NGOs active in the migration, refugee protection and the development field on the European Commission's Communication on "Integrating Migration Issues in the European Union's Relations with Third Countries", COM (2002) 703 final of 3 December 2002 - 10 April 2003
Irregular Migration: a Challenge to European Migration and Asylum Policies Churches facing the phenomenon of irregular migration in Europe --- Position paper adopted by the CCME Executive Committee. - 17 January 2003
Irregular Migration Report, Athens Greece - 1 November 2002
Position on the Amended EU Commission Proposal for a Council Directive on the right to family reunification [COM (2002) 225 final]
Racial Violence - what can churches do against it?" 19-22 September 2002, Ede (Netherlands) Report and Proposals for Actions by Churches
Anti-racism work is work of love, September, 2002
CCME Recommendations: Meeting of the Amman Process, 23-25 May, Brussels
CCME Activity Report 1999-2002
Background Paper on effect of EU Enlargement regarding migration, excerpt: EU Legislation
The complete documents are available from the CCME Brussels office.

Recommendations of the Meeting of the Amman Process, 23 25 May 2002, Brussels

From 23rd to 25th May 2002 representatives of churches from Europe and the Middle East, met in Brussels in the context of the Amman Process. The Amman Process is a regular exchange of experience of church related organisations working on migration and asylum North and South of the Mediterranean Sea. It currently has members in Egypt, the Palestine territories, Jordan, Syria, Lebanon, Iraq, Turkey, Greece, Italy, France, Spain and Portugal. They are members of the World Council of Churches, and the members in the Middle East belong to the Middle East Council of Churches (MECC), the Southern European members to the Churches' Commission for Migrants in Europe (CCME).

In Brussels the participants of the Amman Process meeting had the opportunity to meet with representatives of the European Commission, the European Parliament and a representative of the current Spanish Presidency of the Council. The discussion and exchange with the representatives of these institutions were highly appreciated. Topics of these discussions were the Barcelona Process of the EU-Mediterranean partnership, the focus of EU policy on irregular migration, the policy development with regard to countries of origin and the country Action Plans of the Council on Migration and Asylum, the new proposals for a European readmission and return policy for persons not having a permit to stay.

Parallel to this meeting, the 5th European Asylum Conference of Protestant Churches took place in Brussels as well. This has been an opportunity for some joint sessions and exchange and sharing with a wider churches' constituency in Europe on the priority issues in the Mediterranean region.

In conclusion of the meeting, the following recommendations were formulated:

The deliberations and meetings in Brussels once again underlined the importance of international institutions, particularly of the EU, in the management of migration flows. In this context the efforts of the EU institutions to take a comprehensive approach to the issue of migration were much appreciated.

The meeting also took note of the statement of the Euro-Mediterranean Human Rights Network addressed to the ministerial meeting at Valencia 23-24 April 2002. Some of those recommendations are included here as well.

The following aspects are recommended for further action and deliberation:

In order to achieve comprehensive action, national and international institutions should already in the decision-making process aim at including organised civil society, including faith communities.

Prosperity in the Mediterranean region is related to a strengthening of the judiciary, the respect for human rights and the rule of law, and as such the mainstreaming of human rights into all fields of Justice and Home Affairs.

As such, the legitimate concern for security - including the combat of organised and terrorist crime - must not prejudice respect for human rights of migrants, refugees and asylum seekers both in the EU and within the Mediterranean partner countries, the latter being main receivers of migrants, refugees and asylum seekers.

National and EU legislation should therefore clearly differentiate between legislation and programs aiming at combating crime and legislation aimed at addressing the specific situation of migrants and refugees. With regard to combat of terrorism it should be underlined that crime and criminal activity need to be addressed. As often the description "terrorist" is politically motivated, this includes the danger of disregarding human rights standards. Therefore, a clear policy directed against criminal activity and promoting security can be more clearly defined without calling it terrorism.

EU institutions should be requested to promote instruments for the legal protection of and assistance to boat people (with a focus on human rights in general, rescue programs, as well as the correct treatment at arrival in receiving countries, particularly access to asylum procedures and non refoulement). As the concept of burden sharing is underlying EU policies, this should be further developed particularly for the main receiving EU countries in Southern Europe. However, this concept for the Mediterranean region might need further elaboration reaching also the Southern Mediterranean partners.

The common readmission policy should be developed by EU institutions, with special attention to the respect of human rights in countries persons are readmitted, and include follow up measures for the protection and integration of returnees.

In general, we would recommend that EU institutions undertake an evaluation of the current migration and asylum policy, involving organised civil society in the exercise. Special attention should be given to the relation between restrictive visa policies and illegal migration.

With special reference to the Euro Mediterranean co-operation the meeting recommends:

The Barcelona declaration should be translated into a plan of action for the protection of the rights of refugees and migrants, both in the North and the South of the Mediterranean.

In order to realise comprehensive action on migration, national and European institutions should support networks of civil society in the Mediterranean, which are engaged in advocacy for and protection of migrants, refugees and asylum seekers. The MEDA Programme could be mandated to cover this field of work.

The Euro-Mediterranean partners should develop concrete programmes on training, law reform and capacity building that focus on the promotions of the independence and transparency of justice sector institutions, in particular courts and national human rights institutions.

With special reference to churches and ecumenical institutions, the meeting recommends:

Churches and ecumenical institutions are encouraged to continue efforts to broaden the basis and the support of the network. In particular, they are requested to assist in facilitating access to national and international institutions and other networks and by contributing with experience and other resources.

CCME and APRODEV (the Association of World Council of Churches related development agencies in Europe) should elaborate a common statement on the relationship of migration and development, tackling issues like addressing root causes in countries of origin, distinction between forced and voluntary migration, the role of remittances, readmission and repatriation)

Cooperation between the APRODEV work on the Middle East and the Amman Process should be enhanced.

The ecumenical institutions of both regions should seek to liase actively with the EU Directorate General on Justice and Home Affairs to share migration concerns in the Mediterranean area. Such activities could include a meeting of church leaders of both regions with the EU Commission.

Participants to the Amman Process network meetings should get actively involved in reporting about the problems, needs, initiatives and results on the field. They should share their perspectives and analysis of arising situations concerning the whole or part of the network.

Members of the network should engage actively in informing and sensitising the churches-and ecumenical organisations with regard to the importance of inter-regional networking in addressing migration issues and concerns, and in particular, in liasing with the EU institutions.

Partners should study and explore ways of becoming more interactive and share resources (such as capacities, knowledge, human and material resources). Some churches have tremendous experience in migration counselling, some have created services and institutions. Efforts should be made with regard to developing joint activities in the field of migration counselling.

CCME Activity Report 2000

The Churches' Commission for Migrants in Europe, CCME, is an ecumenical agency working on migration and integration, asylum and refugees, and anti-racism and anti-discrimination in Europe. CCME is an Associate Organisation of the Conference of European Churches and cooperates closely with the World Council of Churches. CCME keeps its members informed on relevant European developments in its areas of concern in relation to the European Union and the Council of Europe. It coordinates church activities in these fields on a European level. CCME lobbies on behalf of migrant and refugee concerns with European institutions, and promotes integration and anti-discrimination.

Since the European Union's Amsterdam Treaty came into force, the EU has competence on a wide range of issues related to refugees' and migrants' concerns. Article 13 of this Treaty states that the EU is to take measures against discrimination on various grounds, including racism. On this basis new legislation is being drafted in the EU which affects persons living in EU member states, but also in neighbouring countries and world-wide. So, lobbying the European institutions, both the EU and the Council of Europe, has gained in importance.

ACTIVITIES in 2000

In 2000, following the decisions of the CCME Assembly at Järvenpää in 1999, three Working Groups were established to allow broader participation and exchange. The Working Groups cover:

1. Monitoring European Migration and Asylum Policies

2. Churches' work with migrants, refugees and displaced persons

3. Anti-Racism and Anti-Discrimination

Each Working Group met twice in 2000. CCME also participates actively in the NGO Platform on Migration and Asylum in Brussels which coordinates NGO activities at the EU. It also participates, with official observer status, in the Migration Committee of the Council of Europe's Committee of Ministers.

CCME works closely with Roman Catholic and other Christian organisations in Brussels. Together with the International Catholic Migration Commission, it issued a background information document on "The Consequences of EU Enlargement for Migration and Asylum Policies in Central and Eastern Europe, taking the examples of the Czech Republic and Poland", written by Robert Scheunpflug and Lynette Tan. This paper is available on request, preferably by e-mail. Contacts were established with churches in the Czech Republic and Poland and this was followed up, e.g. in a seminar on enlargement at the German Protestant Academy of Mülheim/Ruhr in September and a visit to the Czech Republic in October.

In October 2000 CCME participated, also on behalf of the Conference of European Churches, in the preparations for and holding of the European Conference against Racism, as well as the preceding NGO Forum in Strasbourg, France. A statement was also issued on this occasion. See News.

Churches' Commission for Migrants in Europe (CCME)
International Catholic Migration Commission (ICMC)

BACKGROUND INFORMATION FOR CHURCHES IN EUROPE
Impact of EU Enlargement
on Migration and Asylum in
Central and Eastern Europe
taking the examples of the
Czech Republic
and Poland
Robert Scheunpflug and Lynette Tan

Excerpted Chapter:

Legislation of the EU Acquis

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Resolution on Unaccompanied Third Country Minors

Parts of the EU Acquis relating to Migration Control

Carrier Sanctions

Visa Policy

Technical Measures to Assist with Border Control and Deportation

Legislation of the EU Acquis

The following sections provide a detailed review of the laws contained in the EU Acquis pertaining to refugees and asylum seekers as well as migrants. They comprise, firstly, conventions binding on the candidate countries, secondly, resolutions as part of the Acquis pertaining to asylum, and finally, measures to manage migration. It must be noted that sections of the EU acquis addressing migration control actually have a greater negative impact on asylum seekers than the measures dealing directly with asylum, as deterrent measures adversely affect refugees' access to determination procedures. It is vital that local organizations are aware of the full range of legal instruments coming into force and their implications.

International Conventions

European Convention on Human Rights

The European Convention on the Protection of Human Rights and Fundamental Freedoms was adopted in Rome on 4 November 1950 by the members of the Council of Europe and, as all EU Member States are signatories, it ought to be regarded as part of the acquis communautaire. It was signed by the Czech Republic on 26 November 1991 and by Poland on 19 January 1993.

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Article 1 of the Convention states that the Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms" as stipulated in this instrument. This means that the provisions of the Convention apply to all persons, including aliens and stateless persons. Article 4 further states that the rights and freedoms enumerated in the Convention have to be secured without discrimination on the grounds of sex, race, language, religion, and national or social origin. Although there are restrictions applicable to aliens, such as in relation to political activities and freedom of movement, alien status alone is not a permissible ground for discrimination.

Article 3 is concerned with the protection of asylum seekers. It stipulates that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". This, in effect, implements the right of non-refoulement.

The right to family reunification is covered in the right to a family life, which is guaranteed in Article 8. Certain exceptions where public authorities are allowed to interfere are defined.

Finally, Article 13 states that everyone whose rights are violated "shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". As elaborated in Protocol No. 7 (1984), aliens who are lawfully resident in the territory of a State shall not be expelled (barring a legal decision) and are allowed to have their case reviewed and to be represented before a competent authority.

Czech Republic

Most of the rights accorded by the ECHR are contained in the Czech Charter of Fundamental Rights and Freedoms. (1) A new Aliens Law effective January 2000 provides a new toleration status for asylum seekers who do not qualify for refugee status under the terms of the Convention, but whose return would violate the provisions of Article 3. A draft Refugees Law further foresees the granting of refugee status on humanitarian grounds. At present, persons under the toleration status can be provided medical assistance. The EU Commission sees this new status as a positive development if it further allows for the self-sufficiency of the concerned persons, this includes access to the labour market and education for their children. (2)

With regard to the right of family reunification, Article 7 of the Czech Aliens Law foresees the granting of a permanent residence permit in order to reunite the

family. The family in this context is defined as a spouse, sibling, child, parent, or grandparent. (3)

Poland

The rights of aliens and refugees are dealt with under the Polish Aliens Law. Although the right of non-refoulement is incorporated, there appear to be problems in the field of family reunification and procedural matters. Family reunification is not addressed in the Aliens Law, and it is only suggested in Article 45 that competent authorities should offer spouses and minor children assistance towards obtaining the right to enter Poland. The EU Commission's Factual Working Document sees existing regulations as insufficient, causing action to be taken only on a case-by-case basis. (4) In its National Action Plan, Poland has already stated that the notion of family reunification was not only applicable to refugees, but concerned migrants in general. Its enacted regulations should thus seek to cover a more general spectrum of cases.

The right to appeal is guaranteed under the Code of Administrative Procedure, which is reviewed by the Ministry of the Interior and appeals are addressed to the Supreme Court. In practise, long delays limit the access to courts and the full exercise of rights guaranteed under law are not given. (5)

In addition, the right to detention by a competent authority is not met in principle and practice. Asylum-seekers and refugees may be placed in detention subsequent to illegal entry, which is a contradiction of the Penal Code concerning data protection and contravenes stipulations of the Geneva Refugee Convention. Additionally, there is a lack of trained staff competent in the problems relating to the detention of aliens as well as knowledgable in other languages. (6)

1951 Geneva Refugee Convention

The Convention relating to the Status of Refugees was adopted on 28 July 1951 in Geneva by the United Nations Conference on the Status of Refugees and Stateless Persons and entered into force on 22 April 1954. An additional protocol was adopted in 1967. Poland signed the Geneva Convention on 27 September 1991, the Czech Republic on 26 November 1991.

Contents

The Geneva Convention standardised the definition of a refugee as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country." Article 1 also states that a refugee is one who, "not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it."

Article 3 states that the rights guaranteed by this convention are to be applied without discrimination on the grounds of race, religion or country of origin. In

particular, Article 4 states that recognized refugees have the freedom to practice their own religion and to attend to the religious education of their children.

Article 33 establishes the right of non-refoulement. It states, "no Contracting State shall expel or return ("refouler") a refugee …to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." It foresees exceptions for cases where the refugee is considered a threat to the security of the country or a danger to its community.

The Geneva Refugee Convention contains explicit regulations regarding social standards for refugees.

Czech Republic

The Czech Republic's definition of a refugee in Article 42 of the refugee law is in conformity with the 1951 Geneva Convention. Attention, however, should be paid to the definition of non-refoulement: while the wording is in line with the Convention, mechanisms for its practical implementation are lacking. Furthermore, the exclusion and cessation clauses in Czech law allow for a much larger number of cases of exclusion from refugee status than provided for in the Convention. (7)

The treatment of refugees comes close to EU stipulations. There is government funding for the education of recognised refugees as well as provision of housing and help in finding employment. Family reunification is also addressed in Article 3 of the Czech Refugee Law, which allows refugee status to be granted to the spouse and minor children of a refugee, even if they did not fulfil certain conditions in the Refugee Law. (8)

Poland

The definition of a refugee in Article 42 is in line with the Geneva Convention, along with the right of non-refoulement. Article 53 of the Polish Aliens Law prohibits the expulsion of a person if he or she is in danger of persecution. There is however the danger that the implementation of a new law introducing time limits and notions of safe countries might compromise this right. Refugees could be, as has occurred in the past, deported while their initial application for refugee status is still being reviewed by the Refugee Department. In order to prevent this negative outcome, the EU Commission report has recommended training of authorities at Voivod level, and commented that legislation should not add additional reasons for exclusion from refugee status other than those stated in the Geneva Convention.(9)

Refugees are granted the same treatment in wage earning as all individuals who may be legally employed, but only citizens of foreign countries or stateless person with permission to settle in Poland have the right to undertake self-employed economic activities. Although self-employment is in principle open to recognised refugees, refugees face difficulties in registering their enterprises in the economic activities register maintained by the Municipalities. (10)

A clear policy on family unity has yet to be established. The UNHCR is aware of cases where the alien spouse of Polish citizens were expelled from Poland after the procedure for granting refugee status was discontinued upon request from the asylum seeker (11)

In principle, the Polish law foresees unhindered access to the asylum procedure; however, asylum seekers who entered the country illegally are obliged to lodge their applications immediately after entry. NGO experts had requested the full deletion of the time limit, but government experts were wary of possible abuses of this procedure. The UNHCR has observed that refugee claims are being rejected not on the merit of their claims but on procedural grounds that they had not lodged their application within the prescribed period. A list of safe third countries and safe countries of origin has so far not been issued, and further attention needs to be paid that the procedures are in line with the standards of the Geneva Convention in the interpretation of the Executive Committee of UNHCR.

Parts of the EU Acquis relating to Asylum

Dublin Convention on the responsibility of States

The Dublin Convention was the first result of intergovernmental efforts to harmonise the asylum policy within the European Union (12). Although the text was adopted in June 1990, it only entered into force on 1 September 1997. Neither Poland, nor the Czech Republic is yet party to the Dublin Convention.

Contents

The Convention implemented the same principles as contained in the asylum chapter of the Schengen Convention. It identifies the Member States responsible for examining an asylum application and sets out an order of precedence for establishing responsibility. This is based on criteria such as the presence of family members with refugee status, a valid residence permit or visa of the asylum seeker, and the place where the asylum seeker first entered the European Union. The principal objectives of the Convention are to avoid so-called refugees in orbit when no state takes responsibility to examine an asylum application; the prevention of secondary movements within the EU territory; and the prevention of parallel or successive asylum applications within the EU territory. It does not intend to harmonise the asylum policies. The Dublin Convention is presently under review in the EU as a new EU instrument determining the Member State responsible for an asylum application will be developed according to the Scoreboard of March 2000.

When the Convention entered into force, its provisions substituted the asylum chapter of the Schengen Convention. Article 3(3) implies that Member States are to treat asylum applications in accordance with national laws and the provisions of the Geneva Convention. This is an important change in comparison with the

Schengen Convention, where international standards are not mentioned with regard to this question. The Dublin Convention contains important objectives regarding family unity.

In the matter of safe third countries, the Convention includes in Article 3(5) the right of the Member States to expel asylum seekers to third states outside the European Union. The principle of the safe third country was stipulated in the 1992 EC Resolution on a Harmonised Approach to Questions Concerning Host Third Countries, which lists certain criteria to be taken into account before the concept is applied to individual cases. However, this provision contradicts the preamble, which foresees the provision of "all applicants for asylum with a guarantee that their applications will be examined by one of the Member States".

Secondly, this rule falls short of the provisions of the Geneva Convention and the 1967 New York Protocol. The Schengen Convention stated that the refusal of an asylum seeker has to be in accordance with the Member States' international obligations. Consequently, the Dublin Convention does not include other international, regional or thematic human rights treaties, such as the UN International Covenant on Civil and Political Rights, the Convention against Torture, or the European Convention on Human Rights.

In the matter of family unity, Article 4 of the Convention provides for the reunification of members of the same family where at least one member has been recognised as a refugee (under the 1951 Refugee Convention) and is legally resident in a host Member State. Family reunification means only spouses and parents with their unmarried children less than 18 years of age and does not include family members who have a current application procedure within another Member State.

Criticism

Firstly, Article 4 refers only to family members with refugee status. The definition of family reunification by the UNHCR, in contrast, includes other dependants, such as aged parents of refugees living in the same household. The restrictive language of the Dublin Convention may result in the refusal of Member States to recognise the need for family reunification, where one member of the family possesses a status other than that of a refugee who is recognised in accordance with the 1951 Refugee Convention and is legally resident in another Member State.

Furthermore, the article does not deal specifically with the reunification of family members who are obliged, according to the criteria, to submit their applications in different Member States and are awaiting the outcome of their application. This will occur where family members have travelled with visas or residence permits issued by different Member States or have entered the territory via different Member States. Experience of the implementation of similar provisions of the Schengen Convention has shown that family members have been separated over different Schengen States - this situation is not acceptable.

Secondly, the Convention does not contain provisions regarding the social and economic rights of asylum seekers awaiting a decision of the Member State responsible for processing their asylum application or awaiting transfer to the responsible state. The result, as has occurred under the Schengen Convention, could be that asylum seekers in some Member States will not have basic socio-economic rights and that the standard of reception in each Member State will vary considerably.

Thirdly, although the EU Member States have adopted a large number of harmonisation instruments in the field of asylum, Member States' asylum procedures and policies continue to vary, thus producing different decisions with regard to asylum applications of similar factual content. The differing national laws, practices and procedures may lead to injustice in the determination of certain cases that have been transferred under the Dublin Convention and result in refoulement, which constitutes a breach of Article 33 of the 1951 Refugee Convention. For example, divergences in national law and policy may result in an asylum seeker being returned to his/her country of origin by one Member State whilst s/he would have received, for instance, de facto refugee status in another Member State. Member States are therefore urged to undertake further harmonisation in full conformity with international refugee and human rights law, and supervised by a judicial authority.

Binding character of the Convention

The Dublin Convention includes some volunteer clauses, which gives the Member States only the possibility to implement higher humanitarian standards:

Firstly, Article 3(4) ("Opt out clause") of the Convention states that "each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided the applicant for asylum agrees thereto". Operative guidelines should therefore be developed which would assist Member States to identify those cases where Article 3(4) can be applied. Examples of such cases are when an asylum seeker is in poor physical or psychological health, is pregnant, is an unaccompanied child, or has family members in the state where the asylum application has been lodged.

Secondly, Article 9 ("humanitarian clause") of the Convention states the right of every Member State to examine, for humanitarian reasons, an asylum application at the request of another Member State, even when it is not responsible under the criteria laid out in this Convention. The humanitarian reasons refer to family or cultural grounds. In this context, it is important to inform the asylum seeker of the possibility of seeking family reunification or transfer on the basis of cultural needs under the Dublin Convention in order to enable the asylum seeker to present relevant information and to facilitate the implementation of Article 9.

In conclusion, states should be urged to implement the Convention in a flexible and humane manner by invoking the opt-out clause of article 3(4) and the humanitarian clause of Article 9 in the interests of the asylum seeker. They

should also be urged to establish operative guidelines to identify those cases where Article 3(4) and 9 should normally be applied.

Recommendations

Churches and NGOs have criticized the effects of the Dublin Convention. However, they generally welcomed the Staff Working Paper of the EU Commission, which was published in May. This is supposed to be completed with an evaluation on the application of the Dublin Convention by the Council of Ministers. CCME and ICMC, jointly with other church organisations, have stated a position on the working paper. They plead for redesigning the system allowing refugees a choice of place for applying for asylum. They call on EU institutions to financially assist, but not to shift refugees from one place to another.(13)

Common Position on the Refugee Definition

The Common Position of the EU Council on the "Harmonised Application of the Definition of the Term 'Refugee' in Article 1 of the Geneva Convention" was adopted on 4 March 1996 and can be found in the legislation under the title OJ L63/2 of 13 March 1996. It was already taken up in the new Czech Refugee Law in Articles 9 and 10, and in the Polish Aliens Law in Articles 32, 42 (1,2) and 48.

Contents

The Common Position sets out guidelines for the application of criteria for recognition and admission of asylum seekers. It describes persecution as the act of a state organ in legal, administrative and police measures. Prosecution may amount to persecution where it includes a discriminatory element in prosecution or punishment. Persecution by third parties can be considered to fall under this definition when it is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status.

Reference to a civil war or internal armed conflicts is not itself sufficient to warrant the grant of refugee status. Persecution has to be targeted at one of the circumstances mentioned above and to be individual in nature.

Additionally, the resolution stipulates grounds for persecution, such as race, religion, nationality, political opinions or membership in a certain social group. People for whom it is possible to find effective protection in another part of their own country because persecution is clearly confined to one part of a country's territory do not fall under the refugee definition of the Common Position. This latter condition is known as the internal flight alternative. Only if an asylum seeker staying in a third country can show that he fears persecution because the situation in the country of origin has changed or because s/he is engaged in activities that give rise to the fear of persecution, should refugee status be granted.

Criticism

The UNHCR has criticized this resolution for the exclusion of non-state agents of persecution and the related issue of civil war refugees. The main concern is that the EU position will allow states to avoid recognizing people who have been persecuted by non-state agents - such as rebel groups or extremist organizations. This implementation creates an anomalous situation in which someone targeted by the government in a civil conflict could gain asylum abroad, but not an equally innocent civilian persecuted by the opposition. To the UNHCR, refusing refugee status to people who have been subjected to, or who fear, persecution by agents other than their own government is contrary to the text and to the spirit of the 1951 Convention. Persecution that does not involve state complicity is still persecution. The Convention applies when the state is unable, as well as unwilling, to protect such people.

The "internal flight alternative" restricts the access of refugees to international protection. The concept should never be applied in situations where the person is fleeing persecution from state authorities, even if the same authorities may refrain from persecution in other parts of the country.

The question whether or not persecution occurs in a situation of civil war or other internal conflicts in the country of origin is irrelevant to the determination of the status of the individual claimant. The determining factor will always be if the asylum claimant has a well-founded fear of persecution based on one of the reasons stated in Article 1(A) of the refugee definition. Persons fleeing from situations of civil war should never be automatically denied refugee status, since generalised violence does not preclude individual persecution.

Czech Republic

The Aliens Law has been drafted in line with the Joint Position. However, in the current Refugee Law persecution of non-state agents is not defined as a reason for refugee status. Also, the judiciary tends not to recognize persecution where there is no functioning state. It should be ensured that victims of civil wars receive refugee status.

Poland

The definition of a refugee in the Aliens Law does not include the notion of benefit of doubt, which then gives rise to discretionary interpretations of the law. The Polish Alien Law is otherwise generally in line with the Joint Position, and refugee status may be granted under Article 32, although limited access of the UNHCR to status determination procedures makes this difficult to state conclusively. Not part of the Joint Resolution are the circumstances added in Article 42 (2) to constitute grounds for exclusion from refugee status when a safe third country requests extradition alleging the involvement of an alien in crime.

Juridical character of the Common Position

The Common Position is optional in character and considered as a guideline given to the administrative bodies of the Member States. The Amsterdam Treaty provides for the development of new instruments and definitions until 2004. Other

forms of protection may be provided for under national legislation, and in this matter, the concerns of the UNHCR regarding the strict definition of refugee should seriously be taken into account.

It would be desirable forCentral and East European countries to follow the guidance of the UNHCR in the March 1995 Information Note regarding internal flight alternatives. This advised states not to apply the concept to situations of persecution by the state, not to use it within accelerated determination procedures, and to ensure that the internal flight alternative is genuinely durable.

Resolution on Harmonized Approach to Safe Third Countries

The Resolution on Harmonized Approach to Questions Concerning Host Third Countries was signed in London on 30th November and 1st December 1992 by the EU Council of Ministers. It was incorporated in the new Czech Refugee Law in Article 2, and in the Polish Aliens Law in Article 4.

Contents

This resolution is a supplement to the Dublin Convention and implements the notion of the host third country in national legislation. According to this Resolution, an asylum seeker will be denied access to the refugee status determination procedure in a European country on the grounds that the person has already enjoyed, could or should have requested and, if qualified, would actually have been granted asylum in another country. This means that countries can refuse entry to an asylum seeker solely on the grounds that s/he could or should have applied for asylum in a country through which s/he transited. In practice this means that asylum seekers who have travelled through other countries before reaching their destination will not have their asylum application examined but will be expelled to another country as soon as possible. If the asylum seeker had crossed through both EU and non-EU countries, s/he may be expelled directly to the country outside the territory of the fifteen EU Member States, if that country is considered safe by the authorities.

The so-called host third country has to meet three criteria before a rejected asylum applicant can be returned. Firstly, the life or freedom of the asylum applicant must not be threatened. Secondly, the asylum applicant must not be exposed to torture or inhuman or degrading treatment. And thirdly, the asylum applicant, before approaching the Member State in which he is applying for asylum, has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection. Alternatively, there is clear evidence of the asylum seeker's admissibility to the third country.

The Conclusion on Countries in which there is generally no serious risk of persecution is an important part of this legal framework. The Conclusion defines the observance of human rights, existence and function of democratic institutions and stability, in order to constitute a set of standards for the definition of a safe third country. It notes that procedural matters must be taken into account, as well

as advice from a wide range of sources, especially from UNHCR, and previous numbers of refugees and recognition rates.

Criticism

The safe country measure represents one of the main threats to the institution of asylum in the countries of Western Europe. Western European Countries send refugees back to these safe countries despite well-known differences in circumstances and standards. The re-admission agreements lack any reference to the responsibility of states to grant asylum seekers access to procedures for the determination of refugee status and the granting of asylum. Churches in Europe and member agencies of the European Council on Refugees and Exiles (ECRE) have exposed and documented cases in which asylum seekers, due to this practice, have been bounced from one country to another without any state taking responsibility for examining the claim - in some instances resulting in refoulement.

By returning asylum seekers to safe third countries, states are adding to the psychological strain of refugees, the total length of the asylum process, and even to the cost of the asylum system.

Czech Republic

The new Czech Refugee Law prescribes that effective protection will be accorded in the country of return and is generally in line with the Resolution. However, it is not included that persons who cannot return for practical reasons will be channelled to the normal procedure.

Czech law defines a safe country as where the applicant is not threatened with persecution for reasons of race, religion, ethnic origin, political belief or membership of a particular social group. Such cases are subject to accelerated procedures, but in practice, this is not implemented due to the lack of a list of safe countries.

Poland

The Polish Aliens Law defines a safe country of origin as "not the scene of persecutions for reasons of race, religion, nationality, membership of a particular social group or political opinions and [where] no one is subjected to torture, or inhumane or degrading treatment or punishment". Nevertheless, there are no definitions like those in the Conclusion on Countries in which there is generally no serious risk of persecution, which take into account previous numbers of refugees and recognition rates, observance of human rights, the existence and function of democratic institutions and stability of the concerned country. Article 4 of the Aliens Law does not mention the details such as effective protection against refoulement or other standards of the third country.

The rules on how to identify a safe third country are not yet published, which makes it impossible to utilise this concept. Arrival from a safe country of origin does not constitute an automatic bar from procedure; a "manifestly unfounded

application" may however lead to the exclusion from an asylum procedure. In the National Action Plan, it was affirmed that a list of safe third countries ought to be decided on, and a mechanism for periodically updating it.

Recommendations:

Because the resolution states only a minimum standard, any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country. When implementing the new system, efficient communication between border guard posts and central authorities will be necessary to maintain such a basic standard.

So far, the Central and Eastern European countries have adopted similar procedures of safe third country returns. It unfortunately appears that the accession process will only consolidate this undesirable practice. A parallel Dublin Convention for Central and Eastern European countries has been proposed on a number of occasions, which might bring additional safeguards to the process of transferring responsibility for an asylum applicant from one central European State to another. For the parallel Convention to function fairly, asylum systems need to be first harmonized with respect international standards. If adopted, the parallel Convention should seek not to replicate Article 3(5) of the current Dublin Convention, which provides for onward return of asylum seekers to Third States.

Resolution on Manifestly Unfounded Applications

The Resolution on Manifestly Unfounded Applications for Asylum was signed in London, along with the Resolution on Safe Third Countries, on 30 November and 1 December 1992. It was incorporated into the Czech Refugee Law in Article 8 in 1993, and in the Polish Aliens Law in Article 35 and 36.

Contents

The Resolution focuses on how to deal with unfounded applications as set out in the Resolution on Minimum Guarantees. It constitutes the basis for an accelerated procedure, which does not require a full examination. An application is considered unfounded if it fails to meet one of the criteria of the Geneva Convention, such as if there is no substance to the applicant's claim to fear of persecution in his own country, or if the claim is based on deliberate deception or is an abuse of asylum procedure.

The Resolution states the right to a personal interview and if the asylum seeker was excluded from appeal, that a first instance decision has to be confirmed by an independent body distinct from the initial examining authority.

Criticism

The procedures used to establish applications considered manifestly unfounded are often summary and lack the procedural and legal safeguards applied to the

normal asylum procedure. Access to legal advice may be difficult, if not impossible.

Asylum applicants are often penalized on account of their illegal entry; this violates Article 31 of the 1951 Convention, which requires that recognized refugees be exempted from penalization. Most critically, there is often no right of appeal in such cases and the suspensive effect and, hence, effective remedy are also absent. The resolution contradicts the advice of the UNHCR, which states that "in order to be meaningful, the appeal should have suspensive effect allowing the applicant to remain in the country pending the review of his or her case".

Churches in Europe have criticised the problems of procedure. ECRE opposes the use of the criterion of admissibility to examine the merits of an asylum application. If states persist in retaining such procedures, their scope should be radically reduced and essential legal and procedural safeguards ought to be attached.

Furthermore, it has increasinglybecome practice that immigration officers and border officials interview asylum seekers immediately upon arrival at the port of entry. Very often, the interviewer has little or no expertise in international or national refugee law, lacks knowledge of the applicant's country of origin, and has had no training in interview techniques or inter-cultural skills to deal with asylum seekers sensitively. Interviews are often conducted without allowing the asylum seeker to seek legal advice or representation and without allowing the person, who may be exhausted or distressed, to recover after a difficult journey. There is an obvious risk of injustice when the decision on the asylum application is based on a poorly informed or subjective opinion.

Czech Republic

Definitions for manifestly unfounded applications are given. The draft of the new Refugees Law has a seven-day time limit, but because there is no list of safe countries of origin, implementation of time limits could lead to arbitrary practice. Furthermore, there is no time limit required for the decision.

Poland

Articles 35 and 36 of Poland's Aliens Law refer to manifestly unfounded claims but without any definition of these. Given that the list of safe countries of origin has not been issued, accelerated procedures cannot be applied at present.

The procedural safeguards of the resolution foresee a right to a personal interview with a qualified official before any final decision is taken. This however is absent in the Code of Administrative Procedure. Moreover in practice, border guards are empowered to classify an application as manifestly unfounded without any personal interview with a qualified official. The UNHCR has already highlighted the importance of the implementation of procedural safeguards regardless of whether the claim is presented at the border or within the territory.

Resolution on Minimum Guarantees for Asylum Procedures

The Resolution on Minimum Guarantees was adopted on 20 June 1995 and came into effect as OJ No. C274 on 19 September 1996. It was incorporated in the new Czech Refugee Law in Article 3, and in the Polish Aliens Law in Article 37.

Contents

The Resolution applies guidelines to the examination of asylum applications and is part of the Dublin Convention framework. It states the right to an examination by an authority fully qualified in the field of asylum and refugee matters, which means that border controls have to receive clear and detailed instructions about asylum applications. The asylum seeker must have an effective opportunity to lodge an application and the right to stay in the country while the final decision is pending. The asylum seeker also has the right to a personal interview and data protection; legal advice and relevant information must be granted in a language understood by the applicant. The Resolution includes the right to unhindered access to UNHCR and contact with other refugee organizations. This is particularly important in provisions for female asylum seekers and unaccompanied minors.

Criticism

The UNHCR has welcomed the decision to have common standards, as this would include many of the principles it advocates. EU States are nevertheless urged to continue implementing any existing higher national standards. The UNHCR also expressed concerns about the "manifestly unfounded" application clauses and stressed the importance to give every asylum seeker the right to an appeal to legal institutions or the review of a negative decision. Adhering to this principle would minimize the risk of refoulement of a person with a well-founded fear of persecution. This basic principle should guide all asylum procedures and not be subject to exceptions.

Czech Republic

The Czech Aliens Law is not in accordance with the Resolution regarding the examination of an asylum application by fully qualified authorities in this matter. The current system, however, is transitory in the light of reform of the judiciary. It is likely that there will not be sufficient specialized and qualified personnel if the trend of increasing numbers of asylum seekers continues. Attention should be paid to the training of border guards relating the humanitarian responsibility of their work. There is at present no time limit to lodge applications at reception centres, and this leads to discretionary practices by border guards in allowing entry and access to procedures at the centres.

Poland

The duty of asylum-seekers who entered illegally to lodge their application immediately after entry has been criticised by the UNHCR on several occasions.

Attention should also be paid to the legislation concerning the role of commanding officers at the border point, so as to decide whether they play an active role in providing opinions on an application submitted to the Ministry of Interior. It was further noted that the limited number of interpreters as well as their knowledge of only certain languages could have an adverse impact on the length of the procedures.

The Resolution allows the UNHCR unhindered access to asylum seekers and monitoring of the procedure. In practice, this only occurs on a case-by-case basis. UNHCR representatives can participate in interviews as observers only upon making an advance request referring to a particular case. Moreover, the UNHCR does not have direct access to information contained in the files of asylum seekers maintained by the refugee department of the Ministry of the Interior. Although there is the right of data protection within the resolution, the UNHCR is aware of incidents where asylum seekers' embassies were notified after the individuals applied for refugee status in Poland, in contradiction to their wishes. The UNHCR expressed concern about this provision in the Code of Criminal Procedure, which requires courts to contact the embassy of aliens placed under temporary arrest.

Resolution on Unaccompanied Third-Country Minors

The Resolution on unaccompanied minors who are nationals of third countries was adopted on 27 May 1997 by the EU Council of Justice and Home Affairs Ministers and came into effect as OJ No. C221 on 19 July 1997. It was incorporated into the Polish Aliens Law on 23 December 1997.

Contents

Unaccompanied minors are defined as persons below the age of 18 arriving on the territory of a Member State without an adult responsible for them, or who are left unaccompanied after they have entered the Member State. The Resolution states that suitable provisions for an objective age assessment should be guaranteed at the border. It includes provisions for necessary support, medical care and accommodation. Member States have to provide for appropriate representation or other legal guardianship and to guarantee procedures to establish identity and accompanied status. Regarding family reunification, Member States should ensure access for minors to NGOs or other organisations. In general, states should expedite reunification, and in the case of prolonged stay, they have to guarantee access to education pursuant to national standards.

Czech Republic

The Resolution states that asylum application of minors should be treated as a matter of urgency but Czech law gives no provision regarding time limits. Also lacking are procedures to expedite family reunification and to determine the availability of reception facilities in Member States receiving returnees.

Poland

The standards stated in this Resolution are generally applied, but attention should be paid in the field of education and medical institutions. Some unaccompanied minors are placed together with Polish juvenile delinquents in the State care Emergency Center in Warsaw. In these detention facilities, few resources for education for minors are available. The Aliens Law also provides for medical care but in fact, the available treatment is often limited. Finally, financial constraints prevent the observance of special dietary needs of e.g. Muslim children. The National Action Plan states the need to provide for psychological care, as well as the need to introduce special provisions to ensure that siblings are not placed in separate centres due to age differences.

Unaccompanied minors are to be provided with a legal guardian but this seldom happens. Under present regulations, the guardians have no legal instruments to protect the best interests of the child. Poland ratified without reservation the Convention on the Rights of the Child, from which it is possible to derive the Polish authorities' obligation to actively trace relatives, in the interest of family reunion. No case of resettlement for family reunification has been reported to the UNHCR and no procedures are provided in national law to expedite family reunification.

Parts of the EU Acquis relating to Migration Control (14)

Carrier Sanctions

Pursuant to Articles 26 and 27 of the Schengen Convention, all but one of the Member States have introduced sanctions on airlines and other carriers which bring undocumented aliens, including asylum seekers, to their territory. UNHCR, ECRE, churches and human rights NGOs have opposed these measures, which have the consequence of preventing asylum seekers from fleeing their countries or forcing asylum seekers to resort to clandestine entry. As a minimum, UNHCR has advised on conditions for their application, which would mitigate their worst deterrent effects. It is crucial that the enlargement process neither causes an expansion of carriers' liability, nor puts pressure on Central and Eastern European countries that already have carrier sanctions to implement them more vigorously.

Visa Policy

As with carrier sanctions, and pursuant to Article 23 of the Schengen Convention, visa requirements have been used by Member States to deterrent effect. More than any other measure, visa policy has had a major impact on the access of refugees to protection in Western Europe. On 25 September 1995, the Council adopted a Regulation determining those countries whose nationals are required to possess a visa in order to cross the external frontier of the Community. When Associated States become Members, they will have to follow that visa list. However, some of the States on the harmonized visa list are accused of gross and systematic violations of human rights, and indeed EU States have

deliberately applied visa requirements in order to stem certain refugee arrivals from such countries. This is contrary to UNHCR's position that "it would be desirable for states not to impose [visa requirements] where considerable human rights violations occur…"

Central and Eastern European countries should resist political pressure to include refugee-producing countries on their visa lists during the pre-accession period. Intended to curb immigration, such measures are in direct contravention of Article 31 of the 1951 Geneva Convention (and, in the case of carrier sanctions, Annex 9 of the Chicago Convention on International Civil Aviation). More generally, the Central and Eastern European countries should also ensure that asylum seekers are made exempt from penalties for illegal entry, which may hinder or prejudice their application for asylum.

Technical Measures to Assist with Border Control and Deportation

In addition to the above, further migration control measures are being exported from the EU to the Central and East European countries. These are not necessarily part of the acquis but as technical assistance activities intended to secure the eastern border of an enlarged Union. These measures include, for example, funding to assist in the deportation of rejected asylum seekers and information exchange to facilitate such returns, using various EU bodies under the Council framework, namely CIREA (Centre for Information, Research and Exchange on Asylum) and CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration). Information exchange on illegal migration patterns is also well underway, via the 'Budapest Process', and other inter-governmental fora. Although increased funding for reception/detention facilities and border control equipment has been provided to the Central and East European countries, there has been no corresponding provision for monitoring of detention facilities in order to ensure detainees' rights are protected. A better balance between border control programmes and those concerned with the admission and protection of refugees and migrants is needed.

In its position paper, ECRE recommended that the expenditure of aid in the field of Justice and Home Affairs should as far as possible include requirements such as human rights and refugee law training. Certain EU circles ignore the fact that some flexibility in the control of migration movements within the region (particularly the movement of ethnic minorities spread across borders) is in the interests of the Central and Eastern European countries' economies and trade relations, as well as that of refugee protection. To establish overly rigid border and visa controls between the Central and East European countries will be neither workable nor useful, and will undermine the asylum systems as more asylum seekers are deterred from entry or forced to enter illegally.

As a preliminary conclusion, it must be noted that where the current EU acquis lacks guidance on common standards, models of best practice and prevailing standards of human rights law should be implemented.(15) Unfortunately, in many cases, recent legislation in the region reflects the restrictive measures of EU policy, and jurisprudence in the Central and East European countries (CEEC) increasingly follows Western European courts. Nevertheless, it is not too late to

urge Central and Eastern European countries to implement higher standards where EU standards have been found clearly deficient. The Central and Eastern European countries should enter reservations on the points described above. This is most urgent in view of the process within the EU to draw up new legislation in the area of asylum and migration according to the Score Board. It is crucial that past failings should not be replicated, and that EU enlargement does not simply result in the enlargement of a 'Fortress Europe'

NOTES

1. Correlation of Czech Charter with the ECHR is found in the Factual Working Document by the European Commission on the EU Acquis on Asylum. It was produced under the PHARE Horizontal Programme - Justice and Home Affairs from the Round Table Session 1 held in Warsaw, Poland, June 1999. For details on the Czech Republic, refer to Annex 7.

2. Commission Round Table Report, Annex 7:3

3. ibid.

4. See Commission Report. PHARE- JHA Round Table 1 Report, June 1999. For Poland, refer to Annex 4. Regarding family reunification, see Annex 4: 3

5. ibid

6. Annex 4:2

7. Annex 7:5

8. Annex 7:6

9. Annex 4:4

10. Annex 4:5

11. Annex 4:7

12. The Dublin Convention is not an instrument of community law within the meaning of the Treaty establishing the European Community, but a treaty under international law. Therefore it needed to be ratified by all members of the Convention. While initially it was only signed by the 12 EU Member States of 1990, since 1998 all 15 EU Member States have signed the Dublin Convention.

13. This paper is available at the offices of either CCME or ICMC.

14. This entire section is based on ECRE Position Paper para. 11 and 12 p. 11, 1998. This was also taken up in the European Parliament's Working Paper on Migration and Asylum in Central and Eastern Europe p. 5- 6, February 1999

15. ECRE position paper p.3
